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ELEMENTARY

T R E A T I S E

ON

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ESTATES;

IN FEE.

IN TAIL.

FOR LIFE.

— AFTER POSSIBILITY OF
ISSUE EXTINCT.

BY CURTESY.

IN DOWER.

FOR YEARS.

FOR UNCERTAIN INTERESTS.

— BY DEVISE.

— BY ELEGIT, &c.

AT WILL.

BY SUFFERANCE.

WITH

Preliminary Observations

ON THE

QUALITY OF ESTATES.

By RICHARD PRESTON, Esq.

BARRISTER AT LAW.

VOL. I.

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Luke Mansard & Sons, near Lincoln's-Inn Fields.

TO THE
RIGHT HONOURABLE
SIR CHARLES ABBOTT,

&c. &c. &c.

MY LORD,

THIS, the First Volume of the Essay on the Quantity of Estates, a Work written with the express object of facilitating the Study of the Law, is dedicated to your Lordship as a sincere tribute of respect and esteem for those talents, persevering industry, and unblemished integrity, for which your Lordship was so eminent at the Bar, and which have raised your Lordship to the high situation you now fill, as the Chief Justice of the Court of King's Bench. It is gratifying to me to add, that from the examples of patient investigation and sound judgment, your Lordship has exhibited in that important office, the most lively hopes are entertained, that your Lordship's name will be enrolled among the names of those great men who have been the ornament and the pride of the profession of the Law.

I have the honour to be

Your Lordship's

Obliged and obedient Servant,

RICHARD PRESTON.



PREFACE
TO THE
SECOND EDITION.

ON the new Edition of the *Essay on the Quantity of Estates, and of the View of the Rule in Shelley's Case*, it is not necessary for me to say more than that, during a period of thirty years, I have continually been endeavouring to render it more worthy of that reception which it originally experienced from the most eminent characters in the Law.

It has never escaped my recollection, that to this work, the fruit of my most early studies, I am indebted for a large portion of the success with which my exertions have been honored.

The most mature reflection, and the unerring guide of experience in the education of pupils, have brought the fullest conviction to my mind (a conviction originally impressed by the example of *Littleton*) that the knowledge of the Quantity or Measure of Estates, ought to be with every person, anxious to become acquainted with the rules of Property, either as a Barrister, a Conveyancer, a Pleader, or a Solicitor, the foundation of his studies. Every branch of the Law, on Rights and Titles; on Remedies; on the Power of Alienation; on the Modes of Conveyance, &c. &c. and the Forms of Action concerning the Title, or the Right to the Possession, and frequently to relief in Equity, must be deduced from the previous

consideration, what Estate was in the person in reference to whom the material question is to be predicated; and my only regret is, that the Work is not more complete than it will be found, notwithstanding the inconceivable labour which has been employed on it.

The Essay on Merger, in the third volume of Conveyancing; indeed the several volumes of the Practice of Conveyancing, and the Essay on Abstracts of Title, have preoccupied in detail many subjects which might with propriety have been introduced into an Essay on the Quantity of Estates. Each work, however, is rendered more simple by the division.

R. P.

January 1820.

PREFACE

TO THE

FIRST EDITION.

TO THE READER.

TO arrange and digest the Law on the Quantity of Estates, and by this means to assist young Gentlemen on the commencement of their studies, and facilitate their progress, is the avowed design of this publication. It is the production of a young man, who, young as he is, and weighty as the objection to a perusal of his book may be on that account, can with confidence affirm, that he has studied to supply, by industry and application, what he wants in age and maturity of judgment.

Whatever may be the fate of his book, the Author will cheerfully submit to it; and to the opinion of those Gentlemen of the profession who are distinguished for their superior abilities, and the liberality of their conduct, he will readily subscribe; for he would not be understood to arrogate any merit from the execution of the work, or flatter himself that it has any excellence to recommend it. The method and the arrangement are wholly new: the subject is of importance; and the attempt has by those, who are best acquainted with the difficulties of a writer on legal topics, been deemed arduous; indeed, so arduous has the task been thought, that no attempt has been made to the extent of this Essay; and without the least danger of contradiction, it may be asserted, that there is no one book in which the subject collectively has received a full discussion and systematical arrangement. These considerations unite to operate on the mind of the Author, to raise in him a distrust of success.

To complete this volume, imperfect as it will be found, much labour, and more reflection, and some

practical knowledge were required; and by those only, who from experience know the difficulties to be encountered by a writer on a subject of Law, so extensive, as that, which this volume embraces, can an adequate judgment be formed of the pains which have been taken.

The cases from the present time, up to the beginning of the reign of Edward the Third, a period of about 400 years, have been occasionally consulted in the books in which they are reported at large; and in a variety of instances, the law is stated from the most antient of these books; and rules of construction, framed from a great number of particular cases, are now, for the first time, proposed.

Though this Essay shall not prove to be of any assistance to those for whose use it is intended, it is hoped, that it will be allowed that disputable points are fairly stated, and that as to these points the reader is always cautioned against the danger of falling into error.

To enter fully into a detail of all the motives by which the Author was actuated in compiling the Essay contained in this volume, would be to trouble his readers unnecessarily; and to descend to particulars of what he has endeavoured to do, would, in all probability, be to show by his own admission how much he has failed in the attempt.

Some inaccuracies of expression, and errors in punctuation, which arose from want of sufficient leisure to attend to the correction of the press (and will be found principally in the four first Chapters, including the Introduction) will be corrected in the next edition, should the Author be encouraged to hope that a second impression will be acceptable; and to that edition, a full and comprehensive Index, with an alphabetical Table of the Cases, will be added.




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ESSAY
ON
ESTATES.

INTRODUCTORY CHAPTER.

TO a free and commercial people, the laws concerning property are of primary importance.

When the great object of pursuit is the attainment of independence, or easy circumstances in point of fortune, the security of that fortune, when acquired, cannot fail to be interesting in a high degree. As these laws are of such importance, it will readily be acknowledged, that too much attention cannot be employed in cultivating the study of them; or in explaining their scope, and diffusing, as widely as possible, the knowledge of these laws; especially of those branches which occur every day in practice.

The nice and subtle distinctions with which the laws of property abound, have been deemed sufficient to deter young men from entering on the pursuit, and prosecuting their studies with cheerfulness.

The difficulty of comprehending the reason and the scope of the rules of property, will occasion to every person, at the commencement of his studies, some difficulties, and lay him under some embarrassments.

The best advice to be given to him, or which he can address to himself, is, *ne cede malis sed contra audentior ito*. The success of perseverance is certain, and will abundantly compensate the labour. In no instance more than the profession of the law, is it justified by experience, that *fortuna audaces juvat*. Let the studies be systematic; let the foundation of knowledge be laid in first principles, and these principles be well understood!

Afterwards, the subjects should be traced through all their varieties in connexion; keeping the mind closely to the subject under investigation. Thus the difficulty generally experienced will speedily vanish. Let any person study one or two heads of the law fully and minutely, and he will have laid the foundation or acquired the aptitude, for comprehending other heads of the law.

Preparatory to the commencement of such a course of reading, the student should be familiar with the terms and the definitions of the law; and have taken a general view of the system; such a view as Blackstone in his Commentaries, and Wooddeson in his Vinerian Lectures, will afford him. To those who have leisure, and to whom it is not requisite to qualify themselves for immediate practice, a perusal of Bracton and Fleta would be highly beneficial; laying the best foundation for the perusal of Co. Litt. and Lord Coke's Reports; and of these two works it may be justly said, they are the best books of the law.

With this preparation, he will render those studies easy, which, if pursued without system, or without method, would perplex and confound him; giving him a chaotic mass of materials, which he cannot digest into order, unless his endowments be such as fall to the lot of a few individuals only.

Till a recent period, the knowledge of this branch of the law had received a very moderate share of attention, as a science.

The rules of property were scattered in books on the subject of the law in general. The doctrine of Merger affords a striking instance of the justice of this observation. The knowledge of these rules was not to be acquired with

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ease. Much perplexity and confusion must have been experienced by the student, who, out of many disagreeing opinions, equally specious, was to collect the one best supported by principles ; and on whom it was incumbent, from a number of particular cases, to propose to himself, or to extract, a general rule, and to mark the cases which were not within the reason or the scope of the rule. This was to be accomplished only by discriminating the very minute circumstances, by which cases within the reason of the rule, were to be distinguished from those cases which were beyond, or beside that reason.

This was far from being an easy task.

Whoever will trouble himself (*a*) to trace the decisions of the courts of justice on any general head of the law, with a view to its history, will observe, that at different periods, and under different judges, and sometimes under the same judges at different periods, the same or the like question, on similar cases, and sometimes on the same case (*b*), has received different determinations : hence, in part, arose the difficulty of studying the law.

By successive determinations, the laws on property have been formed into a fine and artificial

(*a*) Luder's Pref. 19.

(*b*) *Roe d. Fulham v. Wicket*, Willes' Rep. 303.

system, full of connexions and nice dependencies; into a system which has reason for its basis, and convenience and good policy for its object.

Great as is the confusion of the law on some heads, from contrariety of decisions, it is a matter of surprise that there should, in the mass, be such a conformity of cases with first principles; and that there should not be more anomalous cases, or cases devoid of principle.

Within a few years, many learned and valuable tracts have fully and elaborately explained those heads of the law; namely, uses, powers, fines, recoveries, contingent remainders, descents, copyholds, &c. &c. formerly deemed the most abstruse, and involved in the greatest confusion, from contrariety of decisions.

To propound the rules of property fully and with accuracy; to show their object and extent, and to introduce with judgment the cases which form exceptions to these rules, requires the labour of a series of years, and the experience of age matured in the study.

To these qualifications, the present author, at the time of publishing the former edition, had not any pretensions. As a young—a very young man—who had just attained the age of majority, he wrote for those who were still younger than himself; designing to propound

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to them those rules, and explain to them those cases relating to the subject of the present Treatise, which appeared to him most material to be understood, in the more early part of a professional life.

The study of more mature years, and extensive practice through a period of thirty-five years, have been frequently directed to the extension, the correction, and the improvement of his more early studies, embodied in this elementary Treatise.

The rules of property, relating to the *quantity of estates*, or the *times of their continuance*; the several sorts of estates according to their qualities, as far as the quality of an estate marks the period of its duration; and the rules of construction, and the decided cases by which the time or *quantity* of these estates may be ascertained, are the subjects of this Treatise.

Before the principal subject of this Essay shall be discussed, it will be useful to advert to the several sorts of property, and the qualities and degrees of the estates which may exist in them. The first chapter of this book will be set apart for this purpose.

It may be proper to observe, that there is a wide difference between the *quantity* and the *quality* of an estate.

By the *quantity*, must be understood the *extent* or continuance of time, or degree of interest of the estate ; as, for years, for life, in tail, or in fee. By the quality of an estate, the nature, incidents, and other collateral qualifications of that interest ; as, a condition, a collateral limitation, a joint-tenancy, and the like, are to be understood.

CHAPTER I.

LAND, in its several species, *viz.* arable, meadow, pasture, &c. and houses and other edifices thereon, and interests arising or issuing out of, and being collateral to land, as rents, commons, &c. &c. and personal duties, as annuities, offices, and privileges, as stewardship, &c. &c. are the subjects of property, in which estates exist.

These articles of property are generally divided into (*c*)

1. Lands,
2. Tenements,
3. Hereditaments ;

And this division is sufficient for the purposes of this Treatise, and will be adopted.

(*c*) 2 Bl. Com. 16 ; Shep. Touchat. 88.

Land (*d*) comprehends all external subjects which are the objects of sensation, and admit of *manual* occupation, and are in their nature permanent and immoveable; in short, are part of the terrestrial globe. Thus a house, a garden, an orchard, a field, &c. is land.

Of an upper chamber a feoffment may be made (*e*); of course, it is a corporeal hereditament; in other words, land.

A rectory is of the same description; because it is essential to a rectory impropriate, that there should be glebe or some other corporeal hereditament, thus a rectory lies in livery (*f*).

A tenement comprises every thing which may be holden so as to create a tenancy, in the feudal sense of the word (*g*).

In this sense land is a tenement; for in reality or in fiction, according to the language of our system of tenures, all land is held mediately or immediately of the crown.

Also, by analogy, a rent-charge, or common of pasture, (although interests which are collateral to the land itself,) is a tenement, in the legal signification of this term; for a rent-charge is held of the owner of the land, as of freehold,

(*d*) 1 Inst. 4 a; 2 Bl. Com. 16. 17; Vaugh. 188-9; Shep. T. 88.

(*e*) Co. Litt. 48; Shep. T. 202.

(*f*) Shep. T. 209. 229.

(*g*) 1 Inst. 17; 2 Bl. Com. 17. 104. 106; 1 Inst. 1 b. 6 a. 164; Wright on Ten. 148; Finch's Desc. of Com. Law, 112; 2 Woodd. 6; *Lord Mountjoy's case*; Fleta, 254; 4 Burr. 265; 4 Vin. Ab. 478.

(*ut de libero tenemento*) ; so also is the right of pasturing cattle on the soil of another, in common with him, being the benefit arising from common of pasture (*h*).

A chief-rent is also a tenement ; it comes in lieu of the land itself, and is issuing out of the same ; it is an acknowledgment of seigniority, and admits the ultimate ownership of the land to be in the person to whom the rent is reserved.

Perhaps a rent or common is not a tenement, agreeable to the strict rules of the law of tenures ; it is a tenement, however, in reputation ; it is a tenement within the meaning of several statutes, particularly the statute, (*de donis*,) of Intails.

These considerations are sufficient to give it a claim to be classed among tenements ; and it has been doubted whether an advowson is included under a *devise* of all lands and tenements ; and it is said, that in the case of *Kenrey v. Langham* the Court of King's Bench certified, that an advowson was not comprehended under a devise in those terms ; but that case seems to have been determined on the special penning of the will (*i*). In the language of Mr. Justice *Blackstone*, in his Commentaries (*k*),

(*h*) 1 Inst. 122 a ; 26 Eliz. *White and Sharland*.

(*i*) Cas. temp. Talb. 143 ; 3 Cru. Dig. 500 ; Roll. Ab. Escheat, pl. 6. Tenures, B. pl. 1 ; Bro. Ab. Tenures, pl. 15 ; Com. Dig. Escheat, a.

(*k*) 2 Black. Com. 16, 17.

nothing is a tenement which is not of a permanent nature.

Whether permanency is applied to the durability of the subject, or the continuance of the interest, is not clear. From the mention of *liberum tenementum*, in reference to the permanency which enters into the description, and constitutes an essential quality of a tenement, allusion was, in all probability, made to the *mode* of tenancy ; to the duration and stability of the interest of the tenant in the subject, rather than to the durability of the *subject* itself, independently of the interest, or the time for which it is granted ; and surely the interest of the tenant cannot give denomination to the subject, as to its inherent *nature*, in any other manner than with reference to the duration of interest.

The term, whether applied to the *subject* or the *interest*, is equally vague ; perhaps it is not too much to add, erroneous.

A rent-charge is not in any respect permanent, any more than an annuity ; yet one is a tenement, and the other is not of that description. These contrasted examples prove, that the epithet may be omitted, and that the definition which excludes it will, if not more certain and precise, be at least open to less objection.

An hereditament (*l*) extends to every thing corporeal and incorporeal, whether real, personal, or mixed, which may be taken in heredi-

(*l*) Noy on Ten. 58 ; 2 Bl. Com. 17 ; Shep. Touch. 91.

tary succession; and hereditary succession must be distinguished from a mere occupancy, though the heirs are to be occupants. In this sense (*m*) the term is understood to include all lands and tenements, and all personal duties (as an annuity, corrody; and personal privileges, as to be an almoner, &c.) in which there is an estate of inheritance.

Lands, in their own nature, are the subject of hereditary succession (*n*); but rents, and personal duties and privileges are of that description only, when, from the nature of the estate for which they are granted, they are to be transmitted by that means; and though in the case of incorporeal hereditaments, the quantity of the estate, and the means by which it is to be transmitted, give denomination to the subject generally; yet the subject retains its name as to *lesser interests*, carved out of the general estate, notwithstanding these interests, in point of quality, may not be taken in hereditary succession. Thus, an *estate for years* or for life, in an annuity in fee, is an estate in an *hereditament*; and all estates in land are necessarily estates in an hereditament.

This observation leads to the practical observation, that there is not any inaccuracy in referring to parcels in a deed, as *hereditaments* demised, limited, or, as the case requires, assigned for a term of years.

By such reference nothing more is intended

(*m*) 1 Inst. 1 b. 2 a. 6 a.

(*n*) Noy, Ten. 60.

See page 29
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than to adopt the description used in the former instrument (*o*); for if *hereditaments* are demised by that name, it is, in assigning them, or referring to them, equally proper to adopt this term, as descriptive of the particular subject.

And it is peculiar to a grant of an annuity in fee, that in order to give it perpetual continuance, it must be from the grantor for himself and his heirs, as well as a grant to the grantee and his heirs; for unless the heirs are bound, the law does not *consider* that there is any such lien or fund of a perpetual nature, as will entitle the grantee to an estate to continue for ever. This seems to be the reason of the point, though it has not been found so broadly stated.

The point is applicable only to annuities being personal charges, and it seems to be material only with a view to intails and the rights of representatives (*p*).

Land is both a tenement and hereditament (*q*), and a tenement may be an hereditament. Also, a tenement, and land may be distinct things, and an hereditament (for instance, an annuity in fee) may be neither land nor tenement, and an annuity for life is neither land, tenement nor hereditament.

Again, every tenement is not an hereditament; for instance, a rent-charge, granted for life, is a tenement, and not an hereditament.

(*o*) 11 Mod. 90.

(*p*) *Stafford v. Buckley*, 2 Ven. sen. 170.

(*q*) Salk. 239; 2 Black. Com. 17.

AND GRANT.

The word hereditament is of the most extensive import (*r*).

When used generally, and in its most comprehensive signification, it embraces the several sorts of property in which estates may subsist; and, with the exception already noticed, it includes all of them.

The articles of property which have been enumerated, are again divided into

1. Things lying in livery,
2. Things lying in grant.

Things are said to lie in livery, when the person, in whom the first estate of freehold is vested, has the possession of land in right of this estate; because these things were by the common law properly and generally conveyed by livery of seisin.

Things are said to lie in grant when any person has a tenement or any hereditament, not being land, for any estate; or land for an estate which does not entitle him to the possession; and these things or these interests are said to lie in grant, because a grant, as distinguished from a feoffment, (which can be perfected only by livery of seisin), is a proper, and before the Statute of Uses, and with the exception of fines, was the only mode of assurance for conveying things of this description to a person in whom there was not some previous and subsisting estate.

(*r*) 2 Black. Com. 17; 1 Inst. 6 a.; Shep. T. 88.

14 OF HEREDITAMENTS, CORPOREAL, &c.

Hereditaments are distributed into (*s*)

1. Corporeal,
2. Incorporeal.

Land, in all its varieties, is a corporeal hereditament (*t*); while an estate in land (for instance, a *reversion*) may be an incorporeal hereditament; for the owner of the reversion has not the land; he has merely *an estate* in the land.

All tenements and hereditaments which are not land, and which are held by some one for an estate of inheritance, are incorporeal hereditaments (*u*); though, as to tenements, they are things which issue out of, and are collateral to land, as rents, commons, &c.

Sheppard, in one passage of his *Touchstone*, says, *they* (namely, hereditaments) must be held by the *grantor* for an estate of inheritance; in another passage (page 88) he admits, that lands and other things *held for years*, may pass under the description of an hereditament; and this, most clearly, is the genuine and reasonable construction of law.

Hereditaments also are divided into

1. Hereditaments real,
2. Hereditaments personal.

Mr. *Fearne* has noticed this description of property (*x*).

(*s*) 2 Bl. Com. 17.

(*t*) 2 Bl. Com. 17; *Hale's Analysis*.

(*u*) 2 Bl. Com. 20; *Hale's Analysis*; *Shep. T.* 91.

(*x*) *Fearne*, p. 7; *Shep. T.* 88.

Incorporeal hereditaments, *being tenements*, are said to lie,

1. *In prendre*, as commons ;
2. *In rendre*, as rents.

Hereditaments of this sort are denominated from the *manner* in which the right they confer is to be *taken, exercised, or enjoyed*.

The right of having common of pasture gives to some other person than *the owner* of the soil, the privilege of *taking* the herbage of the soil, by the mouth of his cattle, in common with the owner of the soil ; and because this right consists in taking, the thing is said to lie *in prendre* (*y*).

The right of having a *rent* makes it incumbent on some person to *render* money, or some valuable article, or stipulated service ; and it is said to lie *in rendre*, because this subject of property is to be rendered.

Land is always substantially the same, though, at different times, according to the purpose to which it is applied, it may receive different denominations. It has existence at all times ; and the estate for which it is held at this day, has, in point of title, been subsisting therein from the most remote period of time, and will continue for ever.

Hence the origin and deduction of titles (*z*) : That the title is *good* or *bad*, will depend on the mode in which it is derived ; as by rightful conveyance or by descent on the one hand, or

(*y*) 2 Bl. Com. 32 ; Ventr. 394.

(*z*) Hale's Analysis.

on the other hand by abatement, intrusion, disseisin, wrongful alienation, or discontinuance (*a*); and that a title which was once bad is become good and effectually established may depend on a bar *to the person* in whom *the title* formerly resided, as warranty, or warranty with assets, statute of limitations, *non-claim* on a fine with proclamations, or the destruction of contingent remainders, or a release, &c. Still, however, the title thus established is to be deduced from the *original* and *rightful owner*; for unless there was a good title *in those* against whom the bar, &c. is to be applied, the bar may not be positive and absolute; but titles of entry or rights of action may be subsisting. Some of these persons may have been under disabilities, and such disabilities may have protected their rights, and privileged or exempted them from the bar of the statutes (*b*), &c.

Hence it is necessary in practice, as often as a title depends on adverse possession, and a bar by the statutes of nonclaim on fines, or of limitations, to show to whom the estate formerly belonged, and to see that the bar has defeated the right of all these persons (*b*). For this purpose it must be shown that they were living, &c. when the time of the alleged period of bar or limitation commenced; and that they were at that time free from disabilities, (of infancy, coverture, absence beyond seas, idiotcy, and impropri-

(*a*) Argument in *Goodright v. Forrester*, 1 Taunt.

(*b*) 2 Abstr. 335.

UNDER DETERMINABLE ESTATES, &c. 17
sonment,) which are exemptions from the bar of these statutes ; or that the disabilities ceased at a period sufficiently remote, namely, five years as to fines, and ten years as to formedons and ejectments ; and when lands are limited in strict settlement, this is often a very tedious and difficult investigation ; since the owner of each successive estate has a new period for his claim, and the bar does not begin to run against him, till his right to the possession accrues ; but if the bar once begin to run against the ancestor, it continues to run against him and his issue or heirs, notwithstanding any subsequent disability ; and no persons, except those to whom the right *first* accrues under such estate, can claim any privilege or exemption, by reason of disabilities (c).

If tenant of a determinable or defeasible estate grant a rent, either to a man for life, or to a man and his heirs generally, this rent will, in point of title (d), be subject to the determinable or defeasible quality annexed to the estate in the land.

So if tenant in tail of land grant an estate to another and his heirs, the estate, if not defeated by the issue in tail, (as it may be, unless they are barred,) will determine on the death of the tenant in tail, and the failure of his issue inheritable to the intail.

On the last example it may be observed, that the estate of the tenant in tail has the peculiar

(c) 2 Abstr. 397 ; *Doe v. Jesson*, 6 East. 80 ; *Cotterell v. Dutton*, 4 Taunt. 826.

(d) See *infra*.

quality of admitting of an enlargement or extension into a fee simple, by the operation of a common recovery; and when so enlarged, all interests depending on the estate tail will be benefited by this enlargement; and therefore, though the estate be, in the first instance, a determinable fee, it will become, by the operation of the common recovery, suffered by the tenant in tail, an estate in fee simple; and then all estates, charges and incumbrances derived out of, and depending for effect on the estate tail, would be supported, to the extent of the fee simple, under the title conferred by the estate tail, as enlarged into a fee simple.

This is the only instance of the kind which occurs in the law of tenures. It depends on the peculiar nature of estates tail.

But if a man grant a rent or the like collateral charge to another for an estate tail, and does not extend the grant, the estate derived under this grant, by means of a common recovery, will not be larger than the estate tail. It will be an estate to the grantee or other owner and his heirs, so long as there shall be issue inheritable under the intail (*d*); but if the grant had limited remainders after the estate tail, the estate derived by means of a common recovery would be co-extensive with these remainders, whether they were merely in tail, or extended to the fee (*e*).

(*d*) *Chaplin v. Chaplin*, 3 P. W. 229. (*e*) *Butler's Co. Litt.* 298; *Smith v. Farnaby*, Carter 52; *Weeks v. Peach*, Lutw. 1224.

Interests collateral to, and issuing out of land, (by which are to be intended incorporeal hereditaments, &c.) owe their creation, and it may be said their existence, to the time at which they were *first granted*; and these interests may be and are created every day. They may also be extinguished. The origin of the estates, or times, for which these interests are held, is to be referred to the period at which they were created; that is, the period of their first commencement: and when the interest or subject is extinguished, the estate for which the interest is held is also extinct, as a necessary consequence; for nothing remains in which an estate may subsist. In point of title, however, the rent-charge, &c. depends on the title to the land out of which it is granted.

So that if the title to the land be, as to the person who grants the rent, &c. defective, the title to the rent will be defective in the same degree, since the rent is held under the title to the land. And the title may be in esse as to one person, though the charge be extinguished as against another person.

Incorporeal hereditaments, with reference to every grant thereof, are to be considered as

1. Interests created *de novo*,
2. Interests already created.

An interest is said to be created *de novo*, when it is *granted*, and the time of the continuance thereof is marked by the *same instrument*. On the contrary, an interest is said to

be already existing when it is created, and the time of its *continuance* granted at *one time*; and the same interest is at a subsequent period granted or transferred for all the time, or some portion of it. The first term refers to the original grant, the second to a transfer.

The interest which any one has in lands, or any other subject of property, is called his estate (*f*); and to this term some adjunct or expression must be added, when the time for which the estate is to continue; as for years, for life, in tail, or in fee; or the manner in which it is to be held, as on condition, in joint-tenancy, &c. is to be described; thus it is said, a man has an estate in fee, in tail, for life, for years, on condition, &c. &c.

By the *estate* of any one is to be understood his situation, and the circumstances of his *tenancy*, in regard to the *property* in which he has the *interest* in question (*g*).

Every estate confers the right of enjoyment at present or in future.

This right may be interrupted, as to the possession and estate. After such interruption, the estate is turned to a right, and as to the person whose possession or estate is thus affected, cannot be recovered or regained, without an entry or an action (*h*); and in the mean time, this person has not the estate *in* the property; he has merely *the right to an estate*. In some

(*f*) 2 Bl. Com. 103. (*g*) 2 Bl. Com. 103; 1 Inst. 345 a.

(*h*) 1 Inst. 345 a. b; Noy, Ten. 33; *Goodright v. Forrester*, 1 Taunt 578; 2 Abstr. 420; 3 Abstr. 355.

cases the law, of itself, by its own operation, remits the party to his estate; hence the doctrine of disseisin, discontinuance, and remitter. These rights of entry and of action are descendible to the heir, are releasable to the terre-tenants or any person who has any estate of freehold, but they are not, except in the instance afterwards noticed, assignable or transferrable to a stranger; and the better opinion is, and, as far as there is any determination on the point, the law is, that they are not devisable. These rights, however, may be transferred from a bankrupt to the assignees under a commission against him, by the bargain and sale of the commissioners (*i*).

The principal quality of an estate, in point of interest, is, that it confers on the owner the immediate right of enjoying the property, either at present or in future, for that period of time during which the estate is to continue.

This enjoyment may be exercised either in person or by those to whom the proprietor delegates his right, by the terms of alienation and modes of conveyance which the law has prescribed for the purpose; or the representatives or successors whom the law has appointed, *viz.* heirs, heirs of the body, executors, &c.

The time for which the right of enjoyment is to continue, forms the *quantity of the estate*(*k*); and in the manner in which the right

(*i*) *Smith v. Coffin*, 2 Hen. Blackst. 444.

(*k*) 2 Bl. Com. 103; 1 Inst. 28 a.

to that enjoyment is to be exercised, as absolutely, solely, in common, in coparcenary, or in joint-tenancy, consists the *quality of the estate*.

In some instances there is so near a relation between the quantity and quality of an estate, that the quality of the estate is the measure of its quantity. This observation is particularly applicable to determinable and qualified fees; and, in short, to all estates which have a collateral determination, as to *A* for ninety-nine years, if he should so long live.

The determinable quality of the estate is marked by the clause, if he should so long live; and this phrase also forms part of the quantity or measure of the estate. The observation will be more fully illustrated by the instance of a grant to a man and his heirs, so long as a tree shall stand. In this instance, the words which relate to the tree form an essential part of the measure of the estate, and at the same time render the estate a determinable fee (being its quality) instead of being an absolute fee.

Estates, with respect to their qualities, so far as the quality of an estate has any relation to the time of enjoyment, and also with respect to the manner of enjoyment during that time, may be arranged,

As to their general qualities—into estates,

1. Of freehold,
2. Not of freehold.

As to their extent—into estates,

1. General,
2. Qualified,
3. Particular.

As to the circumstances under which they are to confer, on the one hand, a present right of present or future enjoyment; and on the other hand, a future right of future enjoyment—into estates,

1. Executed,
2. Executory (1).

As to the *certainty* of their giving a present or future right of enjoyment—into estates,

1. Vested,
2. Contingent.

As to the time at which they are to confer the right of enjoyment, either at present or in future—into estates,

1. In possession,
2. In remainder,
3. In reversion.

And estates of this description, in regard to the relative situation they bear to each other, are said to be,

1. { Preceding,
Expectant, or depending.
2. { Mediate,
Immediate.
3. { Original, or *primitive*,
Not original, or *derivative*.

(1) See *Shep. Touch.* 2, for another and different use of the word executed.

As to the manner in which the right to that enjoyment is to be exercised :

I. In regard to the certainty of continuance—into estates,

1. Absolute,
2. Determinable,
3. Conditional.

II. In regard to the mode of tenancy :

1. By one person separately, *viz.* in sole tenancy,
2. By several persons together, and at the same time.

And estates, with respect to the connexion of the tenants, as giving the right to several persons together, and at the same time, are said to be held,

1. By entireties,
2. In joint-tenancy,
3. In coparcenary,
4. In common.

And lastly, as to the mode in which the estates are created, limited, or transferred—into estates,

1. By limitation of the legal estate,
2. By limitation of use,
3. By resulting use,
4. By limitation of trust,
5. By *implication* of law.

Such is the nature and such is the division of estates. The terms by which these estates are distinguished, will frequently occur in this Treatise. On that account, an explanation of the

terms seems necessary, and will be given. This explanation will be prefaced by a few observations necessary to be understood.

Some estates are denominated from the quantity of interest, in point of time, which they comprise, as estates in fee simple, *viz.* to a man and his heirs for ever ; or in tail, *viz.* to a man and all or some of the heirs of his body ; or for life, or years, or at will : others from the modes by which they are raised ; as an estate by the common law, the statute of uses, &c. ; or the manner in which they are taken, as an estate by limitation, springing use, &c. ; or the terms upon or mode in which they are held, as an estate on condition, in joint-tenancy, &c.

The quantity of time comprised in any estate arises from the limitation. The quality of that estate arises from a condition or from a proviso, partaking partly of the nature of a limitation, and partly of the nature of a condition.

A limitation (*m*), whether made by the express words of the party, or existing in intendment of law, circumscribes the continuance of time for which the property is to be enjoyed ; and by positive and certain terms, or by reference to some event which possibly may happen, marks the period at which the time of enjoyment shall end.

The time of limitation or continuance is marked by a variety of means ; sometimes by

(*m*) 4 Reeves, 510 ; Shep. Touchst. 114 ; 2 Bl. Com. 155.

naming the description of persons by whom the estate is to be enjoyed, as heirs, heirs of the body; at other times, by fixing on a certain definite period, as a term of years; and lastly, by referring to some event which, though uncertain as to the time when it will happen, must happen or become impossible, in some cases, within the period of a life, as on the return of C from Rome; in others, within an indefinite period, as till failure of heirs of the body, or during peerage, &c.; and sometimes the time of enjoyment is marked by more than one of these means, as, for years, if A should so long live. In short, every time which can be fixed on for the duration of an estate, may, under the direction of a skilful conveyancer, be used with effect. Though in some instances which occur in practice, words do not answer the intention with which they are used; it may be truly asserted, that this failure is owing either to the unskilfulness of the conveyancer, or, as it more frequently happens, to the confused ideas and indeterminate meaning of the parties, or the defective instructions of the client.

In limitations of the fee simple, the quantity of the estate which is conveyed, is, in deeds, to be marked by the word heirs, generally, without any qualification; and in limitations of qualified and determinable fees or fees tail, the quantity of estate is to be marked by the word heirs, and the addition of those other terms of designation which are proper, and adapted to describe

the particular sort of heirs who are to succeed to the fee in one case, and to the intail in the other case; as to a man and his heirs of the part of his father; or to a man and his heirs, being peers of the realm; or to a man and his heirs of *his body generally*, or to some of them in *particular*.

When the fee simple is to be granted, it is usual to add the word *for ever*, to express more clearly the duration of the interest to be conveyed. This addition is not necessary; however it is proper, particularly with a view to the covenants for title, in reference to the estate which is limited. The words "*for ever*," are merely of declaration and not of limitation.

Sometimes the law changes the import of the words, to give effect to the intention; thus, if a man who has a term of years, grant to another and his heirs, the grant will pass the term, and the executors, and not the heirs, will be entitled as representatives (*n*).

The like observation applies to a grant by a termor to another and the heirs of his body, whether the grant be by deed or will.

And if a person who has a term for years, grant to another for life, the whole term will pass; but the estate of the grantee will be determinable by the death of *celuy que vie*, (the person whose life is named) (*o*).

Always on limitations of determinable fees,

(*n*) Litt. § 740; 1 Inst. 382 a; Shep. T. 426.

(*o*) 7 Rep. 23; 2 Abst. 1, 2; 3 Bulstr. 123.

and generally on limitations of particular estates, the time of enjoyment is marked by the express mention of the period to which the estates shall extend, or the events beyond which these estates shall not continue.

Thus, in conveyances of determinable fees, the limitation is to be made to a man and his heirs during such time as a tree shall stand; or to a man and his heirs, peers of the realm, &c. ; in conveyances of estates for life, to a man during the life of himself, or of some other person, or the lives of several persons; and in conveyances of estates for years, for a certain time, as from one day in one year to another, or the same day in another year; or from some event thenceforth for a *given* time; or for some other given space of time.

When a grant is made to a man generally, without any mention of the time for which he is to have the land, or of the description of persons by whom it is to be enjoyed, the grantee will have either an estate *at will* or for life; unless the person who makes the grant has a term for years, and in that case the grantee (*o*), and also in the case of a bequest by will, the legatee (*p*), will have the land for all the term. So a rent devised generally by a person who has a term for years or for life (*pp*), will con-

(*o*) Vin. Abr. Grant H. 14, 15, 16; Vin. Abr. Estate O. a; 1 Inst. 42; Wright on Ten. 152; Vin. Abr. Estate O. a 1; Skin. 542.

(*p*) 1 R. A. Estate H.; 2 Vern. 45; Shep. T. 401.

(*pp*) : Abstr. 442.

tinue during the term (*q*); and a devise of an annuity out of lands held for a term, will continue during the term (*r*). On a grant to the person generally, without any limitation of estate, the grantee will have either an estate at will or for life, according to the ceremonies observed in perfecting the assurance by which the grant is made.

When the ceremonies proper to create or pass an estate for life are observed, the grantee will have the estate for that period, except in the case of a grant by the King. But if the assurance which contains the limitation be not followed up by these ceremonies, the grantee will have merely an estate at will (*s*).

It has been advanced, that a limitation by grant or devise to a man *and his heirs*, passes an estate in fee; and that the mention of the *persons* by whom the estate shall be taken (*viz.* ~~X~~ the heirs) marks the quantity and extent of interest which is conveyed. This, however, proceeds on a supposition that the grantor has the fee; for if he has only an estate for life, that estate and no more will pass, unless from the forcible operation of the conveyance, as a feoffment, fine, &c. the fee is gained by wrong, and transferred by the operation of this tortious conveyance (*t*). The effect of a grant to a man and his heirs by a person who has a mere chattel interest, as a term of years, has been already stated.

(*q*) 1 R. A. Estate H. pl. 5.

(*r*) Shep. Touch. 429.

(*s*) *Baldwin's case*, 2 Rep. 23.

(*t*) *Goodright v. Forrester*, 1 Taunt. 578; 1 Inst. 327 b.

It is also to be noticed, that a limitation, extending a grant to the *executors*, will not, in any deed, enlarge the estate. The estate will be of the same quantity, notwithstanding the executors are named, as it would have been in case no mention had been made of them.

To suffer the executors to enjoy the land, or the person to whom it is granted to have the land indefinitely, in respect of a nomination of the executors (and the executors must have the land indefinitely, supposing they have it at all, merely because they are named) would be to give an estate in perpetuity, which the executors could not take; and consequently, the person to whom the limitation is made, could not transmit to them.

In *wills*, a devise to the executors may express an intention to pass the *fee* (*u*); but under these circumstances, the right of succession will devolve to the *heirs* and not to the executors.

It is doubted whether, at the common law, executors could take an estate of freehold, in the character of *special occupants* (*x*). The real state of the common law on this point, is now, (except as to rents and incorporeal hereditaments and copyhold tenements,) become a

(*u*) *Infra*, chap. on Fees; and *Shep. T. chap. Testaments*.

(*x*) *Ripley v. Waterman*, 17 Ves. jun. 425; *Campbell v. Sandys*, 1 Scho. and Lefroy, 281; *Sugden's Powers*, 161, 162; 2 *Black. Com.* 260; *contra*, *Fearne's Con. Rem.* p. 306, and *Barn. Ch. Rep.* 49.

AS TO WORDS OF LIMITATION. 31
matter of speculation, rather than of real utility.

In the chapter on estates for life, some observations on this point will be introduced. As to rents and other incorporeal hereditaments, it may be objected, that as the estate determined by death when there was not any special occupant, it will determine notwithstanding the statute.

It is also to be observed, that though a limitation to a man and his heirs generally (*y*), passes an estate in fee; express mention of the particular period for which the land is to be held, as for the life of some particular person, &c. will circumscribe the continuance of the estate.

There is another distinction; when a gift is made to a man and his heirs for years (*z*), and the conveyance does not necessarily operate to give an estate of freehold, the meaning of the parties to pass an estate for years, is evident from the express mention of the time for which the subject of property shall be enjoyed, and no inference or interpretation can be made against the express words. The limitation to the heirs availeth nothing in their favour; and the *executors*, notwithstanding the nomination of the heirs, *will have the term* on the death of the person to whom the same is

(*y*) *Chadleigh's case*, 1 Rep. 140.

(*z*) *Baldwin's case*, 2 Rep. 23; 11 Ass. 21; Doct. and Student, c. 24; 10 Rep. 87; Shep. Touch. 271.

limited (a). And when a person possessed of a term of years, bequeaths the lands comprised *in that term* to another and his heirs males of his body (b), the term will vest in the person who is the legatee, and be transmissible to his *executors* (c), without any right of succession in his heirs males, or reversionary interest in the executors of the testator, on failure of such heirs of the legatee. A bequest in these terms is a complete disposition of the testator's interest, unless words of qualification be annexed to the bequest, restraining the gift in favour of some other person, and introducing a limitation over on an event within the rule against perpetuities. In *Leonard Lovie's case* (d), which was a devise to a man and his heirs males for five hundred years, it was the opinion of the court, that the term was determinable *on failure of issue male of the devisee* (e), either on the ground that the devise was to the *heirs males*, or that a remainder was limited, to take effect on a failure of such issue male, and most probably on the latter ground; and that ground is consistent with the decision in *Butt's case* (f).

(a) 1 Inst. 388 a; 1 Eq. Abr. 179; Moor, 777; *Levice and Goddard*, 10 Rep. 87; *Lovie's case*, Litt. § 740; Tr. on Eq. 61. § 5; 8 Vin. 251; Shep. Touch. 271.427; 2 Co. 24; 10 Vin. Abr. 219, pl. 2. and Ib. Estate T. 10. 3; 10 Rep. 46; Perk. § 558, 559.

(b) *Lovie's case*, 10 Rep. 87. (c) Shep. T. 403. 425.

(d) 10 Rep. 46; 1 R. A. Est. H.

(e) See 1 Mod. 115, contra, but the case is of a gift of an existing term.

(f) 7 Rep. 23.

Taking, then, the cases on a bequest of a term *already created* to a man and his heirs males of his body, and a lease of land to a man and his heirs males of his body for years, into one view, and admitting such lease to give a *determinable* interest, by reason of the nomination of the heirs, the devise passes the whole term absolutely, and the lease a *determinable* interest (*g*).

This conclusion, as to a lease, is denied in 1 Mod. 115; Sel. Cas. in Ch. 30; Vin. Abr. Dev. B. b. pl. 5: it is there said, "*Finch*, Lord Keeper, did deny *Leonard Lovie's* case, which saith, that a case of a lease *settled* to one and the heirs male of his body, when he dies the estate is determined; for he said, it shall go to his executors (*h*).\" The Lord Keeper founded his doctrine on *Leventhorpe v. Ashbie*; that was a case in which a term (*i*) already existing was bequeathed to a man and the heirs males of his body, and not the case of a lease.

According to *Sheppard* (*k*), a gift to a man and his wife, and the heirs of their bodies, for years, though the gift was with livery, is an estate for years.

A devise to a man and his heirs males for years, has been held to pass an estate tail, to comply with the intention of the testator.

This is the language of some books of authority; and the writers of these books seem to

(*g*) But see *Somerville v. Lethbridge*, 6 T. Rep. 213.

(*h*) See Pollenf. 33.

(*i*) 1 R. A. 611. l. 30.

(*k*) Com. Assur. 369.

have relied on the case of *Lovie* as a case in point. The report of that case by Lord *Coke* does not warrant this opinion. *Moore*, however, has the point; and in 2d *Brownlow* (*k*), in arguing a question on the same will, the famous *Dodderidge*, then King's Serjeant, and afterwards a *Judge*, said, the devise to *Thomas*, and his heirs male of his body, for five hundred years, was a good estate tail; for he would not dispute it against two judgments: alluding to the judgment originally given on the case, and the affirmance of that judgment on a writ of error. Besides, the case of *Leonard Lovie* (*l*), as far as it applies to this point, has been questioned; and it is difficult to support the opinion that an estate tail will pass by such a devise, consistently with the opinion of the Court of King's Bench on the case of *Somerville v. Lethbridge* (*m*). In that case the devise was to one for ninety-nine years, if he should so long live, and after that term to his first and other sons, and the heirs males of their bodies, for the like term, and according to the priority of their births; and in default of such issue, then with similar limitations over. The Court certified to the Chancellor an opinion which negatived the idea of an intail created by this devise. They held, all the devises, except those to the first taker and his first son, (who was unborn at the testator's death,) to be void, as too remote; and that the limitations to the

(*k*) *Browne v. Worthing*, 2 Brownl. 104.

(*l*) 10 Rep. 78.

(*m*) 6 Term. Rep. 213.

first taker and his first son gave them chattel interests. Now if a devise to a man and his heirs males, &c. *for years*, might create an estate tail, the general intention would, in this instance, have been called in to support that construction.

In treatises on the law, the material words in the clause of *designation*, more generally termed the clause of limitation, as to the *heirs* generally, or *heirs of the body*, are denominated, in some instances, words of limitation, in other instances, words of purchase.

The same words may, under different circumstances, have different denominations. It is from the effect of the words that the denomination arises. As often as the words do no more than mark the nature, extent, and continuance of the estate, (and this is the application of the word heirs, or heirs of the body, under a gift or grant to *a man and his heirs*, or his heirs of his body, or to *a man for life*, and *afterwards*, by the same or a distinct clause, to his heirs, or his heirs of his body,) they are said to be of limitation. When they limit the estate, and at the same time ascertain the description of persons who are to take and are to vest the estate in the heirs, *in their or right*, (as is the case under a gift or grant to the right heirs or heirs of the body of a stranger, to whom no estate of freehold is previously limited,) they are said to be words of purchase; and though the same words at the same time, and by themselves, independently, ascertain the description

of persons in whose favour the gift is to operate, and measure the duration of interest to pass by the gift, they are said to be words of purchase, and are known by this single appellation. The instances will be adduced, and their varieties shown, when the rule in *Shelley's* case shall be under discussion.

The expression "*words of limitation*" is always used in contradistinction to the expression "*words of purchase*." By the former expression it must be understood, that the *interest* limited by these words is not originally given to the *heirs*, but to their *ancestor*, either mediately, immediately, or eventually; so as to create in him an estate or interest of inheritance descendible to his heirs, of the given description; and subject to the ownership under the gifts, if any, interposed between the several limitations, when there is one to the ancestor, and another to his heirs, or heirs of his body.

By the latter expression is meant such words as give the estate limited by the term "to the heirs," originally in their OWN RIGHT, and as persons answering that description, and not through the medium of, or by descent from any ancestor; so that these heirs are the purchasers under the appellation of heirs, and are to take without any reference to a previous right in their ancestor, in whom the estate, to pass by the limitation to the heirs, cannot vest, in any possible event.

A consequence is, that the power of alienation commences in the heirs, and not in the ancestor;

and the heirs, unless their interest shall be defeated under the rules applicable to contingent remainders, will not be liable to the charges, or bound by the conveyance of the persons who, in point of fact, and in reference to other property, may be their ancestors.

Admit that it is possible that the limitation to the heirs may in any event vest the estate in the ancestor, and the words heirs, &c. will be of limitation; and not of purchase. And when the ancestor has an estate of freehold, a limitation to his heirs may confer an interest on him, descendible to his heirs, though that interest can never vest in the ancestor himself.

The only substantial difference between a limitation to *A* and his heirs, and a limitation to him for life, remainder to *B* in tail, remainder to the right heirs of *A*, is this: in the first instance *A* takes the *entire* fee, as one entire estate; and in the other instance he takes the fee in portions, *divided by* and subject to the estate tail in *B*.

The words, *his heirs*, operate in each case as words of limitation, *viz.* words giving the estate imported by them to the ancestor of the heirs, and not originally to the express objects of the description. They extend the ancestor's estate *immediately* in the one case, and *mediately* in the other case, so that the estate may be taken by these heirs by *descent*; and they limit the measure of the estate he is to take.

When the words, *heirs*, &c. operate only to

expand an estate in the ancestor, so as to admit the designated heirs into its extent, and entitle them to take derivatively through or from him as the root of succession, or person in whom the estate is considered as *commencing*, in point of title, they are properly words of *limitation*; but when they operate only to give the estate imported by them to the heirs described *originally*, and as the persons *in whom* that estate is to commence, in point of title, and not derivatively from or through the *ancestor*, they are properly words of purchase.

Lord *Coke* very appositely refers the word purchase to the express *objects* of the gift, *viz.* heirs; and when such heirs originally acquire the estate by those words, he styles them words of purchase, otherwise not.

In general, words of purchase are those by which, taken absolutely, without reference to or connexion with any other words, the estate first attaches, or is considered as commencing, in point of title, in the person described by them; whilst words of limitation operate by reference to or in connection *with other words*, and extend or modify the estate given by such other words. This (*n*) is evidently the line of distinction adopted by Lord *Coke*, and which pervades the terms of the rule in question, and is, in fact, admitted by all who do not deny that the word *heirs*, in the common limitation to a man and his heirs for ever, is a word of limitation.

But it is to be remarked, that when a gift to

(*n*) *Fearne*, 77.

the *heirs males of the body*, &c. operate as words of purchase ; that is, when they do not give to the ancestor the interest they import, but are to vest the interest in the person *answering the description* of such special heirs, they appear to have an equivocal or mixed effect. Though they give the estate to the special heir *originally*, and not through or from his ancestor, yet the estate which he takes under this gift, has such reference to the *ancestor*, as to pursue the same course of succession, in the same extent of duration or continuance, through the same persons, as if it had attached in and descended from the ancestor (o).

As this rule is of great importance to the profession, and intimately connected with those chapters of this work, which treat of estates in fee and fee-tail, and disclose various instances in which a person shall have an estate of inheritance or mere estate of freehold, a succinct view of the rule will be introduced in a chapter to follow the one on Freeholds. This new chapter should be read after a perusal of the chapters on Fee Simple, Estate Tail, and for Life.

Limitations are of several sorts :

1. As to the terms on which they are to give the right of enjoyment ; they are,
 1. Absolute,
 2. Conditional.

(o) 1 Inst. 24, *Mandeville's case* ; *Southcot v. Stowell*, 1 Mod. 226 ; 2 Mod. 311 ; *Willes v. Palmer*, 5 Burr. 2615.

2. As to the terms on which the estate is to be held ; they are,

1. Direct,
2. Collateral.

An absolute limitation names a day, a time, or an event, for the commencement of the estate, which will certainly happen.

A conditional limitation, or, as it is otherwise denominated, a limitation upon condition (*p*), renders it necessary that some act should be done, or that *some event*, which will *not certainly happen*, should take place before a right to present or future enjoyment can arise.

Contingent remainders, and estates which have their operation by resulting or springing use, or by executory devise, and which are to commence on *an event*, are all raised by conditional limitations. In short, every limitation which is to vest an interest on condition, or rather a contingency, (for that is the correct phrase,) in other words, an event which may or *may not* happen, is a conditional limitation (*q*). And whether a limitation of this sort is to give an interest to commence on *and immediately after* the regular and proper determination of a preceding estate, so as to fall within the description of a remainder ; or independently of and in derogation, and to the exclusion of a preceding estate, it is properly denominated a

(*p*) Fearn, 14, 15 ; Dougl. Rep. 727.

(*q*) Fearn, 11. 14. 16 ; Dougl. Rep. 727.

conditional limitation, or a limitation on a contingency.

In practice, those limitations which are to give an estate, to take effect in abridgment and exclusion of another estate, are more generally distinguished by this term; and those limitations which give contingent remainders, are distinguished by the appellation of *limitations upon contingency*.

Sometimes mention is made of estates as limited on *conditions precedent*; and at other times of estates limited on *conditions subsequent*. This is not a very accurate mode of distinguishing the nature or operation of the gift. Conditions precedent are properly denominated limitations, and relate to the commencement or vesting of the estate, as to *A* and his heirs if he shall go to Rome. Conditions subsequent are those conditions which are to defeat the estate; as that the estate of *A* shall be void if he should not go to Rome within a limited time. One term relates to the perfection or completion of the estate, while the other relates to the defeasance of the estate.

Thus, a contingent remainder is an interest to commence on a condition precedent; it is a conditional limitation; and an estate to be defeated by a condition, is a *condition subsequent*.

And it depends on the intention whether words shall be construed as creating a condition precedent or condition subsequent (*r*).

(*r*) 1 R. A. 415. l. 45; *Peyton v. Bury*, 2 P. W. 626.

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A direct limitation marks the duration of estate by the life of a person ; by the continuance of heirs ; by a space of precise and measured time ; making the death of the person in the first example ; the continuance of heirs in the second example ; and the length of the given space in the third example, the boundary of the estate or the period of duration.

A collateral limitation, at the same time that it gives an interest which may have continuance for one of the times, in a direct limitation, may, on some event which it describes, put an end to the right of enjoyment *during the continuance of that time*.

Thus, a limitation to a man and *his heirs, tenants of the manor of Dale* ; or to a woman during widowhood, or to *C* till the return of himself or of *B* from Rome, or to *D* for twenty-one years if *A* should *live so long*, marks some event for the determination of the estate, which is collateral to the time of its continuance, so far as that time depends on the clause of direct limitation, and the construction of law on the extent of the words of limitation ; and it is said to be a collateral limitation. The circumstance that *A* and his heirs shall be tenants of the manor of Dale, is collateral to the continuance which the estate would have under the limitation to him and his heirs ; for *A* may be alive, and may have heirs, without continuing the tenancy of the manor of Dale ; so after his death there may be a continuance of heirs,

although there be a cessation of the tenancy of this manor.

Also, a woman may live, though she does not continue a widow; and the event of the return of *B* from Rome will not affect the continuance of her own or of *C*'s life; and though *A* should die, his death will neither lengthen or protract the space of time in twenty-one years: but as each of these estates may have continuance to the end of one time, under the clause of limitation, so far as it is direct; and may be determined in the mean time by some circumstance or event collateral to that time, by reason of the superadded clause of qualification, these additional clauses give to the estate a determinable quality, and a denomination expressive of this quality.

Under limitations of estate, subject to collateral determination on events described in that branch of those limitations which causes the determinable quality, the estates will determine as soon as the events arise: and an estate once determined (*s*) by a collateral limitation, cannot possibly exist *at any subsequent period*. Thus, if a grant be made to a man and his heirs, tenants of the manor of Dale, and the person to whom this limitation is made *parts with the tenancy* for any time, *even an instant*, and though he afterwards resumes it, the estate will determine, and never revive to be enjoyed under the first limitation.

However, according to the opinion of An-

(*s*) *Peele v. Needham*, Yelv. 150:

derson and *Rhodes*, there is a difference between an interruption of the time by the *act of the party*, and *by the act of God*. Though, under a limitation to a man and his heirs, tenants of the manor of Dale, the estate does, by a change of the tenancy, determine, never to revive; yet, under a limitation to a man and his heirs, as long as *A B* shall *have issue of his body (t)*, the birth of a child after the death of a parent will have relation to the death of the parent, and in consideration of law, the estate will have had continuance in the mean time.

And this distinction is perfectly consistent with the general rule now established, that a child *en ventre sa mere* (mother's womb) is to be considered as in existence (*u*), for every purpose connected with the benefit of the child.

In this place, however, it may be observed, that though it is a general rule that an estate cannot cease at one time and be in existence at another time, yet an estate may cease *as to one person* and *continue as to another person (x)*. For example, a term, depending partly on *an estate tail*, and partly on the reversion or *remainder in fee*, may be defeated *as to the issue* in tail, and continue in force as against those in remainder or reversion. So if *A* be tenant *for life*, remainder to *B for life*, remainder to *A in fee*, and *A* lease for years, the term will cease

(*t*) 1 Leon. 74.

(*u*) See Buller's Observ. 2 H. Black.; *Doe v. Clark*, 399.

(*x*) See *Baker v. Willis*, Cro. Car. 476; *Beaumont's case*, 9 Rep. 138.

on the *death of A* as against *B*, though it will continue in force *as against the heirs and assigns of A*. But if, under similar circumstances, the *fee is granted*, then the *grantee* has, till union and merger, *two estates*, one for the life of *A*, the other in fee, with an interposed estate in *B* for his life.

Also, under the learning of executory devises and of uses, estates may be suspended, revived, postponed, accelerated, and undergo many other changes not allowed by the rules of the common law.

On all limitations, whether they pass an estate of a freehold or of chattel real quality, it is observable that the estates they convey will actually expire, and, as a consequence, determine, as soon as the event, which is a boundary to the limits of these estates, shall arrive.

A condition has its effect, in *defeating* the estate to which it is annexed, *before the end* of that period to which the estate is extended by the limitation (*y*).

Between a limitation and a condition there is this important difference:

A limitation marks the *utmost* time of *continuance*; a condition marks some event, which, if it take place in the course of that time, will defeat *the estate* (*z*).

Thus *A* demises land to *B* for twenty years:

(*y*) 4 Reeves, 510; Shep. Touch. 114; 2 Bl. Com. 154.

(*z*) Shep. Touch. 118; W. Jones, 58; Co. Litt. 214 b; Cro. Eliz. 360.

the estate may continue to the end of that period, and that period may be fully completed under the lease. The space of twenty years is the period for which the right of enjoyment is to continue, and the words fixing this time of continuance are called the limitation, from their ascertaining the boundary of the estate. Suppose a clause to be added, providing, that if some act be done, or omitted, by either of the parties, or any other person, in the mean time, then the term of twenty years shall cease and be void; this is a clause of *condition*, and on the *rise of the event* on which the term is to cease, or be avoided, and a *pursuit* of title by *entry*, or, if no entry can be made, by *CLAIM*, the condition will defeat the estate of the person to whom the limitation is made, and of all *persons claiming under him*, notwithstanding the period to which the estate is extended in its limitation is not yet arrived. The necessity of *actual* entry is now superseded by the mode in which ejectments are brought to trial by a confession of lease, entry, and ouster. On the other hand, *an estate* ceases, *ipso facto*, when it has completed the measure of its continuance, whether marked by a direct or collateral limitation. No entry or claim is or ever was requisite. The former owner, if he continue the possession, is merely a tenant by sufferance, or occupier; the *seisin, in law* at least, is in the person who has the estate. Perhaps he has even a seisin in fact, by the con-

tinuance of the possession of his *tenant*, especially if the tenant had only a *particular* estate. To gain an adverse seisin against the rightful owner there must be an intrusion by a stranger, or some act on the part of the former owner continuing the possession, to claim the fee, in opposition to, and in denial of the title of the rightful owner (*aa*).

The properties, the nature, and the effects of a *limitation* and *condition* are so very different, that when a condition is annexed to an estate, with a view to defeat the estate in the event which is the boundary to the time of continuance, the condition will be rejected, on the ground that it is repugnant and inconsistent (*a*).

For as it was very justly observed by Lord Chief Justice *Hobart*, in the case of *Stukely v. Butler* (*b*), "A condition annexed to an estate is a divided clause from the grant, and therefore cannot frustrate the grant precedent; neither in any thing expressed, or in any thing implied, which is of its nature incident to, and inseparable from the thing granted." This observation is in its general tendency applicable to the point last advanced. In short, as far as a condition is repugnant to the grant, the condition will be rejected, on the ground of inconsistency. You cannot defeat an estate already at an *end* by its limitation. The con-

(*aa*) *Doe v. Perkins*, 3 M. & S. 271. (*a*) 1 Inst. 224 b.

(*b*) *Hob.* 170.

dition is inapplicable to an estate already determined.

Again, an estate of *freehold* limited, subject to a *condition* which is to defeat the same estate, and by express words to make the estate *void*, will continue till entry or claim by the person entitled to the possession, notwithstanding the condition shall not be performed (*c*).

The law on leases for years was formerly considered to be different. These leases are considered as contracts, and when it is stipulated they shall be void, unless some particular act shall be done, or event take place, the estate was deemed to cease immediately after the condition shall be broken (*d*). But this distinction seems to have been overruled by a recent decision.

And it is also observable, that an estate of freehold, arising under a conveyance to uses, may by a proviso, introducing a springing or shifting use, be determined without actual entry; for in this respect the proviso partakes of the nature of a limitation rather than of a condition (*e*).

A condition and a collateral limitation are, apparently, of the same nature.

(*c*) *Manning's case*, 8 Rep. 95; 10 Rep. 43; 6 Rep. 62, the same observation applied to a bargain and sale, and Com. Dig. Uses, l. 4.

(*d*) 1 Inst. 214 b.

(*e*) *Driver and Edgar*, Cowp. 379; *Gulliver v. Ashby*, 4 Burr. 1929; *Page v. Hayward*, 2 Salk. 570.

In reality they are different.

However near the resemblance they bear to one another may be, the operation of one may easily be distinguished from the operation of the other. The collateral limitation marks the bounds or compass of the estate, and the time of its continuance. The condition has its operation in defeating the estate before it attains the boundary, or has completed the space of time described by the limitation ; and while an estate of freehold, subject to a condition, cannot, under the condition, be defeated without an entry or claim, an entry or claim is not necessary, in any case, to restore the possession on the event which determines the estate in point of limitation.

It is the well known property of a condition, to defeat the estate *before the completion* of the period to which the estate may continue under the limitation (*f*). A grant to *A* and his heirs, “ provided if he shall not pay 20*l.* on a certain day, or on a certain event, that then the estate shall be void,” gives an estate subject to a condition : so also does a lease for twenty-one or any number of years, provided if *B* shall die in any event which may happen in the course of that time, that then the term shall cease.

On the contrary, a grant to a man and his heirs till another person shall have paid him 20*l.*, or to a man for twenty-one years, if *B* should live so long, does not give an estate on

(*f*) *Foy and Hinde*, Cro. Jac. 360. .

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condition (*g*). The words sounding conditionally, form part of the limitation; and the limitation passes, in technical propriety, an estate with a *collateral* limitation, or an estate subject to a collateral determination.

It may also be noticed, that where a PARTICULAR estate is created BY WILL, and a qualification *in the nature of a condition* is annexed to the disposition of that estate, and another estate is limited by the same will, after the estate to which the condition is annexed, the condition is not distinct from the limitation (*h*); it forms *part of the limitation*, and circumscribes the continuance and extent of that estate to which the qualification is annexed.

A limitation to give effect to a remainder, by a conveyance at common law, and limited according to the rules of that law, on an event marked in a *condition* to defeat the preceding estate, is void (*i*). Allow it to have effect, and it would defeat the preceding estate; and, in its tendency, the estate in remainder itself, supposing that remainder to be originally well limited (*k*). For it is a rule of law, that every

(*g*) Dyer, 300 a.

(*h*) Fearn, 307; 4 Burr. 1929; Porter and Fry, 2 Lev. 21; Page and Hayward, 2 Salk. 570.

(*i*) Cogan and Cogan, Cro. Eliz. 360; 2 Leon. 16; Plow. Com. 24 b. 29 b.; Doct. and Stud. lib. 2. c. 21.; Perk. § 831; 1 Inst. 214. 377, 378; Jones, 58; Sayer v. Hardy, Cro. Eliz. 414; Fearn, 390.

(*k*) Fearn, 391.

remainder must be limited so *as to wait* for the determination of the particular estate, before it can take effect in possession; and except in particular cases, to avoid the particular estate is to avoid the remainder limited, expectant on that estate (1).

Again, no remainder may take effect to the prejudice, or in exclusion of, the preceding estate (2). These rules flow of necessity from the definition "of a remainder; and it follows, as the consequence of a maxim of the *common law*, that no one shall take advantage of a condition, besides the person by whom the estate is granted," or privies in representation; as heirs, in case of lands of inheritance; or executors, in case of estates of a chattel quality. But by the statute of 32 H. VIII. c. 34. assignees of the reversion may take advantage of conditions annexed to *particular estates*.

In those cases which involve the circumstances of a particular estate on a condition and a remainder, so far as they are the objects of the present remarks, the question always is, whether the remainder is to commence on the *event*, expressed in the condition annexed to the particular estate, or *without any reference to or dependence on that event*.

Between a limitation of the estate in re-

(1) 1 Inst. 298 a.

(2) *Mary Portington's case*, 9 Rep. 36.

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mainder, and a condition to defeat the preceding estate, there is, in point of law, a manifest repugnance. The limitation and the condition are so inconsistent with each other, that both cannot have effect. Either the condition to the preceding estate, or the limitation of the remainder, must be deemed void, and rejected.

Whether one or the other shall be rejected, must depend on the circumstances which raise the inconsistency; considering that effect is to be allowed to the intention of the parties, as far as the intention is consistent with the rules of law.

When the remainder is limited to commence on that event which is to give operation to the condition annexed to the preceding estate, and to defeat that estate, the *limitation of the remainder will be void.*

Were the condition to operate in defeasance and avoidance of the preceding estate, the limitation of the remainder would be incapable of effect; for the effect of an entry or claim by a grantor or his heirs, for the non-performance of a condition, is to reduce the estate to the *same plight*, and to be held on the *same terms*, as if the estate to which the condition was annexed had not been limited, and consequently to be held discharged from the remainder.

And under a maxim, already stated, of the common law, the person to whom the remainder is limited, could not enter or become entitled, in consequence of a breach of the condition.

When the remainder is limited to commence on the *regular and proper determination* of a preceding estate, to which a condition is annexed, there is not any inconsistency in the limitation of the remainder; for the remainder is to commence *only* on the determination of the particular estate, and to operate *at a time* when it *may have effect*, and when it ought to take place.

In this instance the inconsistency arises from annexing a condition to the preceding estate, not from limiting a remainder to commence *independently of the condition*. The grantor has, by the limitation of the remainder, put it out of his power to *reduce the preceding* estate by his entry or claim. To allow him to enter or claim under the condition, would enable him to defeat the remainder, and derogate from his own grant.

The condition either must be rejected or the remainder will be void; and as the remainder may be deemed good, in case the condition be void, the remainder *will be supported*, and the condition rejected (*m*).

It must also be noticed, that when an estate is limited in remainder of a preceding estate, which is subject to a condition, the limitation of the remainder will *discharge the condition*, and the preceding estate will be absolute; provided the remainder be to take effect *inde-*

(*m*) Butler's Fearn, 271; Dr. Butt's case, 10 Rep. 41 b.

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pendently of the event on which the condition is to operate.

But though a remainder, to take effect on the event expressed in a condition, which is to defeat a prior estate, be void, when it is inserted in a conveyance at the common law, it will be good in limitations of use under conveyances to *uses*, and also in gifts by *will*. And even at the common law a remainder may be limited to commence on the event which is to determine the preceding estate, as in the instance of a gift to *A* till his *return* from Rome, and from and after his return, to *B* (*n*); and also of a gift to *A* and his heirs males of his body, until an act done, and after the act done, to another in fee (*o*). It is true, that in both these instances the limitations were in conveyance to uses; but there is not any reason to doubt of the like limitations being perfectly good if found in a common law conveyance. The event is part of the measure of the estate or duration of ownership, and not of a condition. The event is to determine the estate by limitation, and not to defeat it by condition. The particular estate must have filled the measure of duration, before the remainder can confer a right to the possession.

So that on *Arton* and *Hare*, and the other cases of that class, it is observable that the

(*n*) 3 Rep. 20 a.

(*o*) *Arton* and *Hare*, Poph. 97.

particular estate is not determined by the remainder, but by the limitation which created the particular estate; and though the remainder takes effect on the event which determines the particular estate, it does not take effect in derogation or abridgment of that estate. Indeed, the material point is, that a remainder, to take effect on an event expressed in a condition, which is to defeat an estate, would, if allowed to operate, take effect in derogation and abridgment of the estate to be so defeated.

And, as applicable to the learning of estates to be defeated by springing use, &c. it may be remarked, that if an estate previously limited is to be defeated on an event, it will not, at least in some cases, be defeated in that event, though it should happen, unless the person who is to take under the limitation over, should be capable of claiming under that limitation.

The case of *Fynemore v. Crockford* (p), affords an example of this description.

From these observations, it may be deduced, that if an estate be limited to a man and his heirs until *A* shall attain the age of twenty-one, the estate will necessarily determine if *A* should die under that age. But possibly it may be contended, that if an estate should be devised to or limited to the use of *A* and his heirs, provided that if *A* should die under twenty-one,

(p) 2 Siderf. 130. 151.

the lands should remain to *B* and his heirs, the estate of *A* would not be defeated, although he should die under the age of twenty-one years, unless *B* should be capable of claiming; and therefore the estate of *A* would become absolute by the death of *B*, before the publication of the will or the date of the conveyance to uses.

In the former instance, the words until, &c. are clearly part of the limitation, and circumscribe the continuance of the estate; in the latter instance, they are words of conditional limitation to defeat the estate, and it may be urged that they stand on the ground of a condition become impossible.

This doctrine, however, is very questionable, since the sounder course, and it should seem the practice, is to consider every limitation over as a *quasi remainder*, and abridging the measure of the former estate, by giving it a determinable quality for the benefit of the heir, by way of lapse, as well as the person who was intended to take under the limitation over.

Indeed, from *Goodright v. Searle* (*p*), *Goodtitle v. White* (*q*), *Doe v. Vincent* (*r*), to be examined in the chapter on Fees, it should seem that a limitation over, after a fee determinable by executory devise, is a *quasi remainder*, and induces similar consequences. Unfortunately, however, the analogy is weakened if not de-

(*p*) 2 Wils. 31.

(*r*) 15 East, 174.

(*q*) 2 New Rep. 383.

stroyed by the decision (*s*), which overrules *Scott v. Scott* (*t*), and treats the estate of a devisee (being the heir) of a fee determinable by executory devise, as the old estate vesting in him by descent, and not as a new estate acquired by *purchase*. The case of *Doe v. Timins*, or rather its principle, will, in all probability, become the subject of further discussion.

Provisoes, in the nature of conditions, inserted in conveyances to uses, or in bargains and sales, for determining or *defeating the uses* previously limited, belong to the learning on uses (*u*).

Estates by shifting use generally owe their effect to provisoes of this sort; and these provisoes partake, at the same time, of the nature of a limitation and of a condition. And interests in land, arising by executory devise, owe their operation to provisoes which are the same in form or in effect, and in general are denominated executory devises.

Limitations of shifting use, and executory devises are, in effect, as to the persons whose estate they defeat, of the nature of conditions; and as to the persons in whose favour they are made, of the nature of limitations. In truth, they bear some resemblance to one and the other, and are different from both (*x*).

(*s*) *Doe v. Timins*, 1 Barn. & Alders. 531.

(*t*) Amb. 383.

(*u*) 1 Inst. 237 a; Show. P. Ca. 137; Sand. on Uses, 186; 1 Tr. Atk. 591; *Fry and Porter*, 2 Lev. 21.

(*x*) 1 Collect. Jur. 425; Com. Dig. Uses, L. 4.

For,

First, Limitations must give estates in successive order ; and

Secondly, Conditions must defeat the estate, in favour of the person by whom the conveyance is made ; or his heirs, when the estate is of inheritance ; and *his executors*, when it is of a *chattel quality*.

Thirdly, Estates of freehold are determined by clauses of shifting or springing use, and executory devise, without any entry (*y*) ; and a limitation by a proviso in a conveyance to uses, or in a will, may, under the doctrine of shifting uses or executory devises, substitute one estate in the place of another, by defeating that other estate, or by postponing it (*z*) ; and may give the estate to any one, without distinction of persons : and even at the common law, there may be concurrent limitations, one to *take place* in case the other should fail of effect (*a*) ; but under the rules of the common law, with the exception of estates to be enlarged on condition, a limitation cannot defeat an estate once vested under another limitation or gift.

(*y*) Com. Dig. Uses, L. 4.

(*z*) Fearne, 10. 390.

(*a*) *Loddington and Kime*, 1 Salk. 224 ; *Doe v. Burnsell*, 6 T. Rep. 30.

For other observations on this point, reference must be made to *Loddington* and *Kime*, and other cases cited in the progress of this Essay.

And the same gift may be a remainder in one event, and an executory devise in another event (*b*), or, in reference to another estate; as in the instance of a gift by will or by limitation of use to *A* for life, and after his death, to the first, being an unborn, son of *A*, in fee; and in case there should not be any such son, or if such son should be born, and die under twenty-one, then to *B*; the gift to *B* is an alternate remainder, in reference to the life estate of *A*, and is liable to destruction while it remains in contingency. The moment the remainder vests in the son of *A*, the gift to *B* becomes, in reference to this son, an executory devise or springing use, and will be incapable of destruction by *A*, or by his son.

A point common to all limitations of remainders, either by deed or will, and either by the rules of the common law, or under limitations of use, is, that no person, or class of persons, can take under a remainder, unless such person, or class of persons, come *in esse*; or, being *in esse*, shall be capable of taking vested interests, before the determination of the prior particular estates by which the remainder is supported (*c*).

(*b*) *Doe v. Burnskill*, 6 T. R. 30.

(*c*) *Mogg v. Mogg*, 1 Mer. 654.

Under this rule, contrasted with the rules which prevail with reference to executory devises, a will or a deed of uses may present the singular result, that under different gifts in the same will, by the same terms, by reason of the different rules, and the relative situation of the remainders, nine, or any other number of children, may take under one gift; six, or any other number of children, under another gift; and four, or any other number of children, under another gift. This result occurred in the case of *Mogg v. Mogg* (d).

The qualities of estates, as they are of freehold, and not of freehold, essentially mark the time of continuance, and will be discussed at large in a separate chapter of this Treatise.

A *general estate* receives that name from comprising all the time which may subsist in any subject of property, and from conferring a right of succession on the heirs in every degree and in every line (e); and to distinguish it from

A *qualified estate*, which confines the time to heirs of a *particular description*; and also from

A *particular estate*, which gives only a portion of the time of a general estate.

An estate in *fee simple* is a general estate; an estate to a man and his heirs, on the part of his father, is a *qualified estate*; and all other estates, except determinable fees, as they are

(d) 1 Mer. 654.

(e) Noy, Ten. 69.

for a portion of time, in reference to time generally and indefinitely, are particular estates.

Every particular estate is necessarily a determinable one; at least in the nature of things it will determine when it has completed the measure of its time; and particular estates may cease by effluxion of time, or an end may be put to them by merger, surrender, &c.

Estates have generally been divided into estates

1. Vested,
2. Contingent.

And from the writings of the most esteemed authors it may be collected, that they were of opinion, that the terms vested and contingent embraced all the variety of estates, &c. so that every estate, more accurately every interest, was either vested or contingent (*ee*).

The terms vested and contingent are no doubt applicable to the circumstances under which estates are, on the one hand, to confer a right of present or future enjoyment, and, on the other hand, a future right of future enjoyment. But it is submitted, that these terms are not sufficiently extensive to distinguish all the classes of estates.

On a minute examination of the subject it will be found, that interests necessarily require the further division into interests

1. Executed,
2. Executory.

(*ee*) Fearn, 1.

The difference between interests executed and executory, vested and contingent, are :

An *estate executed* is when there is a *present* and *immediate* right of *present* or *future enjoyment*.

In this sense the term applies to *vested* estates, as distinguished from interests in *contingency*.

In another sense, it applies to the time of enjoyment ; and in that sense, an estate is said to be *executed*, when it confers a *present* right of *present* enjoyment.

Every estate which is executed, necessarily gives a vested interest. Whether the estate be executed in possession, or merely in interest, and not in possession, will depend on the circumstances of its conferring a right of present or future enjoyment.

When the right of enjoyment in possession is to arise at a future period, the estate is executed only ; that is, merely vested, in point of interest : and when the right of immediate enjoyment is annexed to the estate, then only is *the estate executed in possession*.

An *executory* interest, according to the legal application of the term, may be vested or contingent, or it may be of neither description, but, of a peculiar nature, as an *executory* interest by devise, or by *springing or shifting* use, to commence at a time or on an event which *certainly* will happen, or a term to commence from a future time, generally called an *interesse termini*.

Thus, all contingent interests are executory ; and a vested estate may be executory, as far as relates to *the possession*, at the same time that it is clearly vested *in point of interest*. Again, an interest by executory devise, shifting use, &c. while it continues executory, and does not depend for effect on a contingent event, is neither vested nor contingent. The interest which it passes is not *present*, so that it may be *granted*, and therefore the estate is not *vested*. It does not give a right to arise on a *contingency*, and for that reason it is not contingent.

Also, an *interesse termini*, not depending on a contingency, is of a particular description, so as not to be either vested or contingent. These interests arise by contract for the *possession*, and not by regular and ordinary limitation of freehold interests ; and as the reason by which, interests of a freehold quality were regulated by the common law of this country, does not apply to interests of a chattel quality, as terms of years ; these future or executory interests are assignable.

An interest which is executory may give a *fixed* or contingent interest.

In reference to the possession, an interest of this sort does, from its peculiar nature, confer a right of *future enjoyment*.

The difference, to bring it to a point, is, that *all executory interests are not contingent*, and *all contingent interests are executory*. For this rea-

son it is necessary to distinguish between those interests which are *executory* and *not contingent*, and those interests which are *contingent*, and *necessarily executory*.

An interest is contingent only when it depends for effect on an event which may not happen, or may not happen before the determination of the estates of freehold by which it is preceded *and supported*; or is limited to a person not in being, or not ascertained, or to a class of persons not ascertained (*f*). The executory interests which have been noticed, are not of either description; and therefore, notwithstanding they are executory, they are not contingent. It must be acknowledged, that an interest, executory in point of interest, does not give *any immediate right*, so that the owner may be alleged to have seisin of that estate; yet it does not always and necessarily depend on an event which is uncertain, whether an interest which is executory shall ever confer a fixed right of enjoyment.

A devise of an interest of freehold quality, to commence at a future day, as the 4th of next month, or on an event which certainly will happen, as the death of *B*, gives an executory interest, in other words, an interest which is *not executed* immediately, so as to be *vested*.

Between interests there clearly is a distinction, under which they may be considered as vested or contingent, executed or executory; for an interest

(*f*) 1 Fearn, 1 to 9.

which is executory may be neither vested nor contingent, and yet give a *certain and fixed right of future enjoyment*. Mr. *Fearne*, indeed, (and the weight impressed by the authority of his name is sensibly felt,) ranks future uses, and all such conditional limitations and other future interests as are not referred to or made dependent on a period or event which is uncertain, among estates vested in interest; and if he be right in this position, the terms vested and contingent embrace every description of interest.

With the observations which have been submitted to the reader, he must judge for himself.

A *vested estate* gives a certain and fixed right of present or future enjoyment; that is, an interest, *clothed* with a *present legal* and existing right of alienation. For by a vested estate, in application to interests of a freehold quality, is to be understood an interest clothed, as to legal estates, with a legal, or, as to equitable estates, with an equitable seisin, which enables the persons to whom the interest is limited, to exercise the right of present or future enjoyment *immediately*, in point of estate.

An interest, when vested, and whether it entitle the owner to the possession now or at a future period, is fixed, and present; so that the right of ownership over the land, or other subject of property, to the extent of the estate or ownership, may be aliened.

An estate which is vested is directly the contrary of an interest which is contingent;

and the terms vested and contingent, as used in reference to the certainty that gifts entitle the owner to the enjoyment of a present interest, are contrasted terms.

No interest which is vested can be deemed contingent; and no contingent interest can be deemed vested.

Again, every estate which is executed necessarily passes a vested interest. On the other hand, no interest can be allowed to be vested, while it gives an interest which is executory. The notion of an executory interest is irreconcilable with the idea of a vested interest, although many interests which are executory are not contingent.

It follows, that the terms executed and executory, contrasted with each other, have one sense, at least, *peculiar* to themselves, and *not common* to the contrasted terms vested and contingent. A limitation which, by executory devise or springing use, is to give an estate at a future period, or on an event which certainly will happen, *does not*, it is submitted, pass a *present*, though it gives a *fixed right* of enjoyment.

Notwithstanding the right of enjoyment be fixed, and does not depend on an event, the interest, which is limited, is not clothed with legal seisin, till the stated period shall arrive, or the prescribed event shall take place.

Till the arrival of that time, or till that event, the person to whom the gift is made has not any legal estate. He has not a vested interest,

because he has not any *seisin*, or, in other words, such present right as will enable him to exercise an immediate act of ownership by alienation. Wills must be excepted, now that future or contingent interests are devisable (*g*).

A contingent interest (*h*) gives a right of enjoyment to arise on an event expressed, or implied (*i*) by law, and it is not certain that the event will take place. And whether the remainder be to take place on the event which is to determine the preceding estate, or independent of the determination of that estate, is totally immaterial. That an event which will not certainly happen, must arise before the estate to commence on that event, is to take effect and vest in interest, is the material circumstance. If *C* be at Rome, it is not certain that he will return: for this reason, an interest limited to commence on *that event*, is contingent; and when *C* has an estate determinable on his return from Rome, and a remainder is limited to commence on that event, the remainder is contingent. However, it is not contingent merely because it is to commence on the determination of the prior estate. Its contingency depends on the circumstance, that the determination of the preceding estate is to be occasioned by an event which will not certainly happen, and that *event* is to give effect to the remainder.

(*g*) *Perry v. Jones*, 1 H. Bl. 30.

(*h*) *Fearne*, 1, s. 4.

(*i*) 2 Abstr. 95.

The case in 3 Rep. 20, in which a feoffment was made by *A*, to the use of *B*, *till C returned from Rome*, and *after the return of C*, then to remain over in fee; and the case of *Arton v. Hare* (*k*), in which a fine was levied to the use of *A*, and the heirs male of his body, until *A* should do some particular act, and after that act should be done by the said *A*, to the use of *B* in tail; depend wholly on this distinction.

For these examples only warrant the conclusion, that a remainder is contingent when it is limited to commence on an event which will not certainly happen; as the return of *C* from Rome, or until a particular act, depending on a contingency, shall be done; and though the estate previously limited by the same deed is to determine on that event, the remainder will be contingent.

The rule is not, as formerly propounded by Mr. *Fearne*, that a remainder is contingent, as often as the *determination* of the *preceding estate* itself depends on *an event which may never happen* (*l*). This rule must be understood with the qualification, that the remainder is limited to commence *on the event*, which is to determine the preceding estate; or, in the language of Mr. *Fearne*, in the 4th edit. pp. 3, 4, where a remainder depends on a *contingent determination* of the preceding estate itself.

(*k*) Poph. 97; 10 Rep. 85. b.; *Fearne*, 4.

(*l*) *Fearne*, 3d edit. p. 4.

Adopting the language of the 3d edition, and explaining it,—the true ground of the cases is, that “the determination of the preceding estate itself depends on an event which may never happen,” and the remainder is limited to commence on that event.

In neither of the cited cases was the remainder contingent, because the preceding estate might have determined by an event which never might have happened. In each case the ground of the determination was, that the remainder was limited, to take effect on the contingency of that event.

That the law is now stated in its true point of view, will be evident, by supposing a remainder, to be limited, to take effect *independently* of the *event* by which the preceding estate is to determine, and in express terms, *on the actual determination of that estate (m)*. In a case with these circumstances, the remainder will not be contingent; it will be vested; and were the contrary to be decided, it must necessarily follow that no remainder could be so limited as to be a vested interest, when the remainder depends on a particular estate, which has a contingent event for its determination. But it is universally allowed, that by some means or other, a remainder may be limited with effect, so as to be a vested interest, after and expectant on *any*

. (m) Fearn, 18; Lord Vaux's case, Cro. Eliz. 369; 1 Leon. 243; 1 Inst. 225 a.

particular estate, whatever may be the nature of the event on which that estate is to determine.

It is the present capacity of taking effect in possession, if the possession were fallen, which invariably distinguishes a vested remainder from a remainder which is contingent (*n*). This is the position laid down by Mr. *Fearne*, for distinguishing a vested remainder from one in contingency.

Now, when a remainder is limited to a person *in esse* and ascertained, to take effect, by words of *express limitation*, on the determination of the preceding particular estate, this remainder is most clearly and unquestionably vested.

The person to whom the remainder is limited may, in respect of the limitation of his estate, assert a right to the possession, as soon as the possession shall fall. On the contrary, when a remainder is limited, to vest on the return of *C* from Rome, that event *must arise* to give effect to the limitation in remainder, as a vested remainder; and until the event shall arise, there is not in the donee of the estate passing by that limitation, any capacity of taking the possession.

Should the possession fall, as it *may, before the event shall arise*, the donee of the remainder would not be entitled to the possession immediately. Therefore, and because the rise of that event is *uncertain*, and may not happen,

(*) *Dormer and Fortescue*, 3 Tr. Ask. 125; 10 Rep. 85; Butler on 1 Inst. 332.

the remainder, limited to take effect on that event, must necessarily be contingent. It is not the event which is to determine the preceding estate, but the *event which is to give effect to the remainder*, which distinguishes a vested remainder from one which is contingent.

Though the event on which the preceding estate is to determine, be the same event as that on which the remainder is to commence, still the remainder is not contingent, because the preceding estate is to determine on a contingency, but because the remainder is to commence on that event.

In the case cited from 3 Rep. the remainder was not deemed contingent, because the preceding estate was to determine on the return of C from Rome; nor in the case of *Arton v. Hare*, cited from *Popham*, because the preceding estate was liable to be determined when a particular act should be performed; but in each of these cases, because *the event* by which the preceding estate was to determine, was to *give effect* and commencement to the remainder as an estate, distinguished from a mere interest; and not merely, or in any respect, because the event on which the remainder was to commence, was the event on which the preceding estate was to determine; but precisely in the same manner as if the event for the determination of the one estate had been distinct from that on which the other estate was limited to take effect in possession.

It is morally certain that *C* will die, and that either sooner or later there will be a failure of heirs of his body. For this reason, a limitation to *B*, *after the death of C*, when tenant for life, or after failure of heirs of his body, when tenant in tail, will give a right to the possession, on the determination of the prior estate; and the remainder will be vested. The remainder will not be contingent, even though it be limited by words applicable to an event which apparently may or may not happen, but which in reality only mark the time when the remainder is to commence in INTEREST (*o*), in reference to the estate immediately preceding, and which will determine on the event really expressed by the words introducing the remainder; as a limitation to *B*, if *A*, to whom the estate tail is previously given, *shall die without issue*.

To this class may also be referred those cases in which a remainder is limited by words expressive of a condition precedent, to vest the estate; while, in point of law, they merely express an event on which the estate is to determine. Of this description are *Doe v. Nowell* (*p*), *Edwards v. Hammond* (*pp*); and

(*o*) *Holcroft's case*, Mo. 487; *Boraston's case*, 3 Rep. 19; 1 P. W. 170; 2 Tr. Atk. 304; *Mangfield v. Dugard*, 1 Eq. Cas. Abr. 195; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Lea*, 3 Term Rep. 41; *Fearne*, 367, 368; *Badger v. Lloyd*, Lord Raym. 523.

(*p*) 1 M. & S. 327.

(*pp*) 2 Show. 398.

they decide that the limitation over gives a fixed and certain, and consequently a vested interest, on the determination of the prior estate, and not a remainder depending on a contingency.

And it is now settled, that a gift, either originally or by way of remainder, to a person, with superadded words of contingency, and with a limitation over on that contingency, will be vested, and not contingent. The condition is subsequent as to the first of these two donees, and precedent as to the other (*q*).

On contingencies with a double aspect, a more detailed note will be found in the Appendix.

Remainders to take effect eventually, interests to arise, either by springing or shifting use or executory devise, on an event which will not certainly happen, are all contingent interests, till the event on which they are to give a certain fixed right of present or future enjoyment shall happen.

However, all interests which depend for effect on the doctrine of executory devises or of shifting or springing uses, are not *contingent*. Necessarily they are executory and not vested; and they will be contingent or not, according to the distinctions which have been submitted to the reader; namely, the circumstance that they do or do not limit an estate on an event which certainly will or will not happen; being contingent when the event will not certainly happen,

(*q*) *Doe v. Moore*, 14 East, 601; 1 Mau. & Sel. 327.

and not contingent when it is certain that the event will happen. On this subject, also, a more ample discussion will be found in the Appendix.

The interest passing by a limitation which does not give a *fixed right* of *present* or *future enjoyment*, is contingent because it is uncertain, and depends on *an event* which will not certainly happen, whether the limitation, even in the order and at the time when it is to take place, will ever confer such right of enjoyment.

As soon as the event which the limitation describes, and on which the estate is to vest in interest, shall happen, the interest becomes vested; for it no longer remains uncertain whether the gift will confer the right of enjoyment in possession, when the possession shall be vacant.

This is equally true in regard to limitations by way of remainder, and limitations to take effect under the learning of executory devises and springing and shifting uses.

It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between an interest which is vested and one which is contingent. It is in one case, the certainty and fixed right of having the enjoyment at the time when the possession shall fall; and in the other case, the uncertainty of having this right at that time; which are universally the characteristics and distinguishing features, in the

former instance, of a *vested estate*, and, in the latter instance, an interest in *contingency*. Still it follows, from the nature of interests depending on executory devises and springing uses, that until they operate to transfer the freehold, they are not vested, though they may not be contingent.

This deduction depends on the laws of tenure, and the necessity, under that law, of giving the fee to the heir at law, till the will or the declaration of the uses can draw the same from him, either entirely or by portions.

The tenant of a vested estate has a present and *certain* interest, which, though it may not yield him any immediate profit, because it does not entitle him to the possession at this instant of time, gives him the ownership of the land for the time included in his estate. That ownership may be exercised by an immediate disposition of the land, to be enjoyed in future, at the time when the owner of this estate shall become entitled to the possession in right of his estate, according to the limitation or gift under which he claims, and the relative situation of his estate, in reference to the interests of other persons.

A contingent interest does not give any *certain* nor any *immediate* right, or any estate, in the land: it gives a mere possibility; a possibility which is coupled with an interest, when the person is fixed, and ascertained; and such possibility, coupled with an interest, is devisable by will; may be released; may pass by the

bargain and sale of commissioners of bankrupt; may be bound or extinguished by estoppel; but it cannot be granted or transferred by the ordinary rules of the common law, though it may be bound, in equity, by contract (*q*).

And mere possibilities to persons not ascertained, as to the survivor of several persons, to children who shall attain twenty-one, to children who shall be living at the deaths of their surviving parent or the death of one of the parents, or the like contingency, are *not coupled* with an interest; and though such a possibility may be bound or extinguished at law by estoppel, and in equity by contract, yet the possibility is not devisable, or, it is apprehended, transferrable to assignees under a commission of bankrupt (*r*).

An interest, executory in point of estate, may give a certain right of enjoyment; but that interest cannot, in point of estate and right of alienation, otherwise than by *will*, be *immediate*; and, in this particular, executory interests, and interests in contingency, stand on the same footing (*s*).

Until the event marked by the limitation of a contingent interest takes place, it is doubtful whether the limitation will at any time confer the right of enjoyment, because it is uncertain whether the event on which the estate is to commence, will ever arise. This is equally true when

(*q*) 2 Abstr. p. 93.

(*r*) 2 Abstr. p. 95.

(*s*) *Roe v. Jones*, 1 H. Bl. 30; *Schwyn v. Schwyn*, 1 Burr. 132.

applied to interests by executory devise, or by springing or shifting use, when they are to take effect on a contingency.

Were the uncertainty that the person to whom a remainder is given will ever become entitled to the possession, to be the distinguishing mark of a contingent interest; then every interest in remainder of a freehold quality would necessarily be contingent. This is by no means the case (*t*).

Those interests alone which are contingent, by reason that the limitation describes an event which will not certainly arise, fall within the terms of the description already given of interests of this denomination.

An interest may also be contingent (*u*).

First, Because it is limited to a person not *in esse*; as a child before it is born; and in that case the interest cannot vest till the person to whom it is limited shall be born; or,

Secondly, Because the person, though born, is not ascertained; as the survivor of several persons, or the heirs of a person who is living, or a class of persons who shall attain twenty-one, or the like; or,

Thirdly, Because the interest is limited by way of remainder, and to commence on an

(*t*) *Duncomb v. Duncomb*, 1 Saund. 151; 3 Lev. 437.

(*u*) *Fearne*, 6; 3 Rep. 20; 1 Vent. 306; 2 Abstr. 113.

event, which, though it will certainly happen, may not happen during the continuance of the preceding estate of freehold (x); as an estate to A for his life, and after the deaths of A and of B , or after the death of B alone, then to C .

All these interests are constructively to commence on an event; for unless the child be born, the person ascertained, or the time or event on which the remainder is to commence, shall happen before the determination of the preceding particular estate, the estate limited on either of these contingencies will not commence in interest. Therefore, the definition first given of a contingent interest, taken generally, and applied to the circumstances under which remainders are to vest in interest, extends to every possible description of interests of that quality.

In determining whether a remainder be contingent, on the ground that the preceding estates may determine before the remainder can take effect in possession, or vest in interest, agreeable to the terms in which it is limited, the judgment must be formed on the consideration that the preceding estate can or cannot determine before the remainder may take effect in possession, as far as it is connected with that estate.

(s) 3 Rep. 29; *Weale v. Lower*, Pollexf. 57.

When it is certain that the remainder may take effect in possession, on the determination of the preceding estates of freehold, at whatever time, and however early, and by whatever means, these estates may determine, the remainder must be considered as vested ; and it is contingent when this certainty does not exist.

Although the words by which the estate is limited, seem to have reference to an event which may or may not, and apparently will not, happen, before the determination of the preceding estates ; yet if, in point of fact, or consideration of law, they do not express any contingency, or do not express a contingency beyond an event which will certainly happen, in the sense in which the words referring to this event are used, the remainder will be vested.

The cases of *Holcroft*, *Boraston*, &c. and *Weale* and *Lower*, and *Lanesborough* and *For*, stated in the sequel of this Essay, in the chapter on Freeholds, will show the application of these positions.

Again, when a remainder is limited to commence at a period which, according to the course of events, will take place on the determination of the preceding estate ; while it is possible, though highly improbable, that the preceding estate may, in point of time, expire or determine before the event shall arise on which it is limited to determine, the remainder will be deemed vested.

Thus when a grant or devise is to *A* for ninety-nine or any other number of years, (exceeding in calculation the probable period of the life of the person on whose death the term is to cease,) and the term is determinable on the death of *A* or of *B*, and a remainder is limited to commence on the death of the person with whose life the estate for years is to determine, the remainder will be vested, and not contingent (*y*).

In this case it is *possible* that the term might expire, by effluxion of time, before the death of *A* or of *B* may take place, and consequently before the period or event on which, according to the terms of the grant, in their literal import, the remainder is to take effect in possession. But the allowed common probability, that the duration of the life will not exceed the continuance of the term, and the certainty that the term must determine with the life, induces the Courts to adopt the construction, that the remainder is to commence on the *determination* of the preceding estate; for, as Mr. *Fearne* (*z*) very justly observes, "If the life cannot exceed the term, and the term must determine with the life, the limiting an estate to commence from the expiration of the life, is, in effect, limiting it to commence from the determination of the term."

(*y*) *Fearne*, 20; *Napper v. Saunders*, Hutt. 119; Lord *Derby's* case, Litt. Rep. 370; *Weale v. Lower*, Pollexf. 67.

(*z*) P. 26.

Under these circumstances the particular estate may, possibly, according to the terms of the limitation of the *remainder*, determine before the remainder can come into its place, in point of possession: still the remainder is vested; because the event on which the remainder is to confer a right to the possession, is of such a nature, that agreeable to general understanding and the nature of things, the remainder is to commence in possession, at whatever time and by whatever means the particular estate may determine.

From the observations already offered, it will be collected, that this construction has place in those instances only in which a limitation is for a long term of years, determinable on the decease of a person; and a remainder is limited to commence from the *death* of such person, and not on the expiration of the years, or determination of the term, as it ought in propriety to be; so that, under the terms in which the remainder is limited, taking them in a literal sense, it is possible the years may expire before the decease of the person on whose death the term is to determine; and, of course, the term may determine before the remainder could, if death was the time of commencement, take effect in possession. However, since in all human probability the life will not continue beyond the given space of years, and the term of years will determine with the life, the Courts construe the remainder, as limited in substance, to com-

mence on the determination of the term, and allow the remainder to be vested : consequently it will confer a right to the possession on the expiration or other sooner determination of the term.

To afford the necessary grounds for this construction or conclusion of law, the term must be of such extent in its number of years or period of duration, that, in all human probability, the life will die before the term can expire by effluxion of time.

No authority can be adduced to warrant the specification of any particular period, as equally applicable to all cases, for raising this construction. Every case must, it is submitted, depend on the age of the person whose life is named. Whenever the fair and rational presumption, consistently with the order of nature, is, that the person whose life is named will die before the years can expire, then the principle of the decisions will be applicable to the case. In one instance, threescore and ten years were held a sufficient time to call for the construction. Perhaps, as a general rule, seventy years may be taken as the standard for the continuance of life; and the number of years be in every instance tried by that standard. Health, or disease, or constitution, cannot be a guide for legal presumption.

It should seem to follow, that a much shorter period would equally require that construction, when the difference in time is made up by the

age of the life; for it is by reference to the age of the life and the probability that the term will expire before the decease of the life, or that the life may survive the term, that the construction must be governed.

Under this construction, the owner of the remainder will be entitled to the possession, after the expiration of the term, without any regard to the continuance of the life. Should the term determine by his death, the remainder would commence in possession on the death; and should the life survive the term, the remainder would commence in possession on the expiration of the term, without waiting for the decease of the life. These conclusions necessarily flow from allowing the remainder to be vested.

Another reason for which a remainder must be contingent (*a*), is, from its relative situation to another estate, as depending on the circumstance, that another estate, previously limited in contingency, shall not vest in interest. This is peculiarly the case of alternate fees; i. e. a gift of one fee to be substituted in the place of another fee, in case that other fee should not vest in interest.

Thus, if a grant, or limitation, or devise, be made to A for his life, and after his decease, in case he shall have a son, to such son in fee, or to a person *in esse* in fee on a contingency, being in law a condition precedent; and in case

(a) *Laddington and Kimo*, Lord Raym. 208.

A shall not have a son; or such contingency shall not happen in his life-time, then on the death of *A*, to *B* in fee.

The estate of *B* will be contingent, partly, at least, because his estate is to take place only in case another estate in fee shall not vest in interest; and this contingency is implied by the law precisely to the same extent as if it were expressed.

By express words, the second fee might be vested while the first fee remained in contingency; but then the first fee must operate by executory devise or shifting use, and not as a strict and proper remainder.

The instance of a residuary devise passing the fee, while the remainder is in contingency, may be deemed an exception.

Perhaps it is an anomaly, and adverting to principle, it is far from being clear, that the intended remainder may not, by reason of the residuary devise giving, in effect, the vested remainder, be converted, *ex necessitate*, and by operation of law, into an executory devise; for how can the same estate, depending on two interests, one vested and the other contingent, be in one and the same person at one and the same time (*b*).

Of interests limited on a contingency, it is generally true, that they cannot vest unless the contingency arises.

With a view to the greater number of in-

(*b*) - But see *Goodtitle v. White*, 2 New Rep. 383.

stances, the contingency, when it is expressed, must arise agreeable to the words of contingency, and the sense the parties have annexed to these words.

Sometimes, however, we hear of contingencies with a double aspect. Under these contingencies an estate may take place, although the contingency which is expressed does not arise. A few observations on the nature of this contingency; may be useful, and shall be subjoined.

A contingency with a double aspect, is when *one event only* is expressed by the party, and two events are clearly in his contemplation. This is a construction in favour of the intention, that the intention may not be frustrated. The general rule is, that an interest to commence on a contingency, shall not take place unless that contingency shall arise. It is in a few cases, only, that this favour is extended by construction. The exception seems to have been borrowed from the mode in which remainders are limited, and the construction which the limitations of remainders receive; and under which every estate will take place after the preceding estate, without any regard to the particular time at which, by the words of the remainder, the estate is to take place. In these cases, the Court proceeds on the intention that the determination of every prior or intermediate estate, shall accelerate the commencement of the more remote estate. It is

on similar grounds of intention, that the contingency with double aspect is allowed ; for it is allowed on the idea that, by the intent of the testator, the estate limited on a contingency referrible to one estate, shall also take place in case the contingency should not arise on which the prior gift is to vest in interest ; and then, in point of law, the contingency has a double aspect : providing, by expression, for a contingency annexed to the interest previously limited, and also, by inference and construction of law, for the event that the contingency on which the prior interest is to vest, shall never arise. This is the nature and import of a contingency with a double aspect.

In *Gulliver v. Wickett* (c), the testator devised to his wife for life, and after her death, to such child as she was then supposed to be *enseint* with, and to the heirs of such child for ever : provided, that if such child as should happen to be born, should die before the age of twenty-one years, leaving no issue of its body, then he devised to other persons : and the wife neither had a child nor was *enseint* with one, and it was held, that the limitation over was good ; and in delivering the opinion of the Court, Chief Justice *Lee* observed, “ we are of opinion, that whether the limitation to the child never took effect, or whether it did and was determined, was the same thing ; and as

(b) 1 Wils. Rep. 106.

the remainder to the child never could take effect, the next devise over must take effect." And in *Fonnereau and Fonnereau (d)*, in expressing the grounds of a judgment on a devise, under similar circumstances, Lord Mansfield observed, "there could be no devise over, in case of the issue of a child dying, and not in case of the child itself dying without any issue at all." So that these cases turn on the ground of intention, inferred from the collective interpretation of the will. The Courts imply those words of contingency, which would have clearly expressed that intention, which they infer from the terms of disposition in which the testator has expressed his will.

These contingencies with a double aspect were also very accurately described by Lord Mansfield, in the case of *Jones and Morgan (e)*. In *Atelyn and Ward (f)*, Lord Hardwicke said, "he knew of no case of a remainder or conditional limitation over of a real estate, whether the first limitation were by way of particular estate so as to leave a proper remainder, or the conditional subsequent limitation were to defeat an absolute fee before limited; but if the precedent limitation, by WHAT MEANS SOEVER, be out of the case, the subsequent limitation should take place."

The conclusion from the cases is, that the limitation over will be considered to give an estate to commence in possession, as soon as

(d) 1 Dougl. 487. (e) MS. Rep. (f) 1 Vez. 430.

the interest previously limited shall be removed, *either by failing of effect, or by taking effect and afterwards determining*, as often as the intention calls for this construction, although the contingency which is expressed merely provides for the determination of the interest under the former gift.

In short, every conditional limitation over, to operate by way of remainder, or to take effect after a prior gift, or in case that gift shall fail of effect, is assimilated to and construed as of the nature of a remainder.

As soon as an *interest ceases to be contingent*, without failing of effect, it becomes a *vested interest*.

Estates vested in interest (*g*), are also said to be executed; and interests which are contingent, are said to be executory.

These terms are applied with reference to estates, in regard to the certainty of the right of enjoyment.

An estate which is vested, is executed as to that right (*h*); while an interest which is contingent, is, in this particular, only executory.

All estates which are executed, admit of transfer by alienation; some absolutely, others *sub modo*.

Interests which are contingent, or for any other reason not vested, are, with the exception of an *interesse termini*, not the subject of aliena-

(*g*) 2 Bl. Com. 168.

(*h*) 2 Bl. Com. 163; 1 Leon. 33; 2 Woodd. 733.

tion otherwise than by *devise*. Thus an interest which is executory, and in that sense not vested, may be devised; but it cannot, under the rules of the common law, be transferred by deed.

This interest, as well as all other contingent and executory interests, may be released, or may be extinguished by feoffment, fine, or common recovery, operating by estoppel (*i*), or may be bound by estoppel (*k*); and an assignment to a purchaser for a valuable consideration, will be sustained in *equity*, on the ground of *an agreement* (*l*); and when the interest becomes vested, that Court will, against the vendor, order a conveyance to be made in performance of the agreement.

Whether this equity be personal against the vendor, and not obligatory on his heir, is a point in doubt, and on which it is desirable that a decision should be obtained (*m*).

An estate *in possession* gives a present right of present enjoyment.

An estate in *remainder* gives a right of future enjoyment, whether certainly or eventually, will depend on the form of the gift: and when the interest is contingent in its limitation, then on the events which have taken place.

An estate in reversion gives a *present* fixed *right* of future enjoyment.

(*i*) 1 Leon. 33; *Pells and Brown*, Cro. Jac. 590; *Fearne*, 8; 1 Inst. 143 a; *Helps v. Hereford*, 2 Barn. & Ald. 249.

(*k*) *Weale v. Lower*, Pollexf. 54.

(*l*) *Wright v. Wright*, 1 Ves. 409.

(*m*) 1 Anstr. 11.

A remainder (*n*) is an estate limited to commence after the determination of a particular estate, previously limited by *the same deed* or instrument out of the same subject of property; or, as Lord Coke (*o*) defines a remainder, it is "a remnant of an estate in lands or tenements expectant on a particular estate, created together with the same at one time (*p*)."

In defining a remainder, Noy, in his *Maxims*, describes it to be "the residue of an estate, at the time appointed over, and that must be grounded on some particular estate."

And it should seem, a remainder may be limited by one of two deeds made at the same time, and operating as part of the same assurance (*q*).

Indeed, even a gift by appointment in one deed, made in pursuance of a power in another deed or instrument, may be a remainder (*r*); and it should seem, though that point is doubtful, may be connected with an estate of freehold, so as to bring a limitation to the heir or heirs of the body, within the influence of the rule in *Shelley's case*.

A reversion is that part of an estate which, after the disposition of a particular estate, or several particular estates, remains in the

(*n*) *Fearn*, 8. 19; *Goodtitle v. Billington*, Dougl. Rep. 727; 1 Tr. Atk. 594.

(*o*) 1 Inst. 143 a. (*p*) *Moss v. Parker*, 4 Mod. 815.

(*q*) Sed. Qu. (*r*) *Venables v. Morris*, 7 Term. Rep. 343.

person who creates that estate or those estates.

A remainder must necessarily be preceded by a particular estate; and that it may be good in the first instance, it must be limited and have effect by the deed or instrument by which that particular estate is created, and so as to take place in possession immediately, without any interval, on the regular and proper determination of the estate immediately preceding, and *not in abridgment or derogation* of that estate; and to commence in interest after a particular estate, and not after and expectant on the determination of an estate *in fee*, either *qualified, base, or determinable* (s): and an estate at will is not a sufficient foundation for a remainder (t).

It has already been observed, and may again with propriety be noticed in this place, that the person who has the estate in remainder, cannot take any advantage of conditions annexed to the preceding estate; and that an interest limited by way of remainder, to commence on *an event*, marked by a condition to **DEFEAT** the preceding estate, is void in its limitation; and that when a condition is annexed to a preceding estate, and the remainder is limited to commence, *substantively*, on the *determination of that estate, independently of the*

(s) 1 Inst. 47. 143 n. 378 a; Plowd. 25; 2 Bl. Com. 165; Fearn, 15. 191; *Cogan and Cogan*, Cro. Eliz. 360.

(t) Wats. Principles, 3d edit. p. 5.

condition, the condition will be discharged, and the estate of the particular tenant become simple and absolute (*u*).

An estate arising by clauses of *springing* or *shifting use* or executory devise, may take place independently of the determination of subsisting estates, either by defeating the same, or removing them still farther from the right of conferring a title to the possession (*x*).

It follows, that estates which arise by these means, do not, on their limitation, fall within the description of remainders, though eventually, when they are executed and become expectant on the determination of a preceding estate, they may, with propriety, be ranked under this class of estates. These interests take effect by limitations, termed *conditional*, in contradistinction to limitations upon contingency (*y*); and it is to be understood, that conditional limitations have effect only in wills and conveyances to uses, and not in deeds which owe their operative force entirely to the common law.

The difference between limitations which give contingent remainders, and limitations which give estates conditionally, not being remainders, is, that all remainders, whether they are to

(*u*) Fearn, by Mr. Butler, 271; Dr. But's case, 10 Rep. 41; 1 Inst. 118 b.

(*x*) Com. Dig. Uses, L. 4; Fearn, 11. 390; Butler on 1 Inst. 271; Carwardine and Carwardine, Fearn, Mr. Butler's ed. 388.

(*y*) Fearn, 11. 17. 103. 187.

take place absolutely, or on an event, must be limited to commence in possession on the regular and proper determination of the estate immediately preceding; and estates which take effect by conditional limitation, are to commence in possession independently of the regular and proper determination of the preceding estate, and in abridgment and derogation of that estate; and these irregular gifts can be limited only in wills or conveyances to uses, or on trusts by conditional limitations, as distinguished from those limitations on a contingency, which give estates falling under the denomination and description of remainders.

These conditional limitations, when made by will, are termed *executory devises*, and are to be referred to the learning on that subject; and when contained in conveyances to uses, they assume the name of springing or shifting uses.

Conditional limitations, in a more general sense, comprehend the learning on contingent remainders.

In this Essay, remainders of this description will be considered as having effect by limitations on a contingency.

The observations already made, are not offered with an intention to deny that one limitation may not substitute an estate in the place of another, and still give a remainder.

The only instance of a conditional limitation

at the common law, as distinguished from contingent remainders, is the case of a grant *in fee*, on condition, in enlargement of an estate for years (2).

It is clear, that even at the common law, one fee may be substituted in the place of another fee; but then these fees must be preceded by a prior particular estate; and the latter gift can be *good*, and give a vested interest only in the event that the fee first limited should not vest in interest (a).

Cross remainders are of a complex nature, and of them a definition is now to be attempted. Remainders of this sort have this denomination, when several farms or parcels of land, or several parts of the same farm or parcel of land, are conveyed to several persons, and these several persons are, by the form of the limitation, to have the farm, parcel, or part of each other, when their respective estates in their respective farms or parts shall determine. These remainders are common to and may be raised effectually under deeds at the common law, limitations of use, and limitations by devise. In deeds they cannot arise without express limitation, at least without words clearly expressing an intention to give remainders of this sort. In wills they frequently arise by implication; and in distinguishing the instances in

(2) 1 Inst. 216 a.

(a) *Lockington and Sims*, 1 Lord Raym. 668.

which they may and may not arise, great skill and nicety are required.

And since questions of this sort generally and for the most part are applicable to gifts of estates tail, the learning on those remainders will be introduced into the chapter treating of these estates. The present purpose will be answered by defining these remainders, and showing their nature, their qualities, and extent.

It is not necessary that the parties should, in the first instance, take by way of remainder.

It frequently happens that they take under limitations, which, as to their original shares, confer a right of immediate possession.

The doctrine of cross remainders is always applied to estates which are to take place in the share or parcel of land of each person, on the determination of his estate in that share or parcel of land. The denomination does not apply to the estates which the parties take in the original shares under the first gift or limitation to them.

Cross remainders must be defined, *first*, as between two persons, and, *secondly*, as between three or more persons: for no definition of cross remainders, as between two persons, would be sufficiently extensive to show the nature of these remainders as between three or more persons.

Cross remainders, between two persons, are a remainder limited to each of two persons, in

lands, or the parts of lands, previously limited to the other of them.

Cross remainders, as between three or more persons, are several remainders limited to each of three or more persons, in lands, or the parts of lands, previously limited to each of them, and operating by way of successive accumulated remainders on the several aliquot parts, which each takes in the shares of the others ; so that, in the first place, or by way of immediate estate, each person is to have a parcel of land, or a part of a parcel of land, and the others, as tenants in common, are to have an *estate* in remainder in the lands or part of this person ; and the persons taking each part under each successive gift of remainders, are to have remainders, in like manner, in the part limited to each other, till every subdivided part is divisible between two persons only ; and then each of these persons is to have a remainder in the share of the other ; so that, ultimately, by small undivided parts, the entirety of the lands may centre in one person. These remainders place the parties in the like situation as coparceners, inheritable to each other : observe this difference, however ; as many parties as there are, according to the number of the persons taking under cross remainders, so many *successive* interests, either vested or contingent, there will be in every part. The consequence is, that if *A* and *B*

are tenants in common, with cross remainders, each of them has an estate in the part of the other; and in each part there are two estates; one limited to the person taking originally, the other to the person taking by way of remainder.

So if three persons are tenants in common, with cross remainders between them, there will be three distinct and successive estates, in different degrees, in each part; and the second estate, being the first remainder in that part, will limit that part between those two persons who do not take any interest in the original share of that part; and these two persons will take as tenants in common, and a remainder be limited to each of them in the share of the other. When more than three persons are tenants in common, with cross remainders between them, there will be an increased number of remainders; adding one remote or successive remainder, in every part, and in every degree, for each distinct person; and every remainder, in each part, will exclude the person who takes under the limitation or gift of any prior estate in that part; or in the original share of which this particular part is a subdivided portion.

The subdivision is originally by parts; so that each person taking under cross remainders has an estate in each part; and the owner of every other part takes a remainder in the share or respective shares of the other or others of the donees.

The right of possession under cross remainders, may be assimilated to the order of succession between coparceners. In the mode in which they become entitled to the possession, and the proportions in which they take, there is a very near and striking analogy. In point of estate and interest, there is not any resemblance whatever. Every person whose title is to commence by descent, has a mere expectancy, a right or chance of succession, depending on the death of his ancestor, and subject to the power of alienation by that ancestor. Under cross remainders, each person takes an estate in his own right; so that he has an estate in every part of the land at the same time, by parts. In some parts he may have an estate in possession; in other parts, one estate by way of immediate remainder; and in other parts, one estate, or several estates, by way of more remote remainder: and, ultimately, he may become entitled to the entirety in possession. But then his right will be by different degrees of possession, and under different estates in every part.

Generally speaking, the entirety is, in the first place, divided into equal shares; corresponding to the number of persons who are to take these shares; and on the determination of the estate of each person, the others are to take the part of that person between them, as tenants in common, by way of remainder. Thus the lands are, as between these remainder-men,

divided into one share less than the original shares of all the parties.

On the determination of the estate of each remainder-man, the part of that person is to be divided between the other donees, by way of remainder; so that the shares in that part, under this remainder, will be reduced in number; and so on, as to the part of each person, under each successive remainder, till the entirety of each original share shall, by parts, have been limited to each person, and consequently, by parts, the entirety may vest in possession in one individual.

Cross remainders, as between four persons, do, with a view to each part, become, in the first line of remainders, as cross remainders between three persons; and in the next line, as cross remainders between two persons.

When the remainders are limited as between more than four persons, then on each successive limitation of remainders in each part, the remainder in that part will experience a similar reduction; and on every more remote and successive line, the remainders in each part must be considered as crossed between one person less than the number of persons in the former line of remainders in that part.

The reason of this reduction, is, that each successive remainder is introduced in place of the estate of another person; and is a provision for the determination of that estate, and

and making it necessary that the estate of that person should be determined before the next remainder limited in that part should, as far as respects the possession, come into its place.

To elucidate these observations, and apply them first to cross remainders between two persons.

On cross remainders between two persons, either separate parcels of land or undivided parts of the same land, are limited to them with this provision, resulting, as a consequence of law, on the declared, or, in wills, the presumable intention of the settlor, that each taker shall have the lands, or the part, of the other of them, when the estate of that person shall determine. And as each person has a remainder in the lands, or part, of the other of them, these estates are called cross remainders.

It is difficult to represent the situation of those persons who have these remainders, by lines or any symbolical figures. It is still more difficult to define remainders of this description. They are to be described rather than defined. The descriptions now given, are as accurate as the Author of this Treatise could make them. He is sensible, however, that, of themselves, they will convey a very imperfect idea of the remainders intended to be described.

The most satisfactory manner in which the estates, and the situation of the tenants of these

remainders, can be exhibited, is by a short abstract, showing the order in which the remainders are placed.

Suppose *A* and *B* to be tenants in common, with cross remainders between them; in point of effect, the lands will stand limited in this manner :

As to one moiety :	As to the other moiety :
To <i>A</i> for life, or in tail.	To <i>B</i> for life, or in tail.
Remainder to <i>B</i> for life, or in tail.	Remainder to <i>A</i> , for life or in tail.

When three persons (for instance, *A*, *B*, and *C*.) are tenants in common, with cross remainders between them, then the order of limitation will be in this form :

As to one third part :	As to another third part :	As to the other third part :
To <i>A</i> for life, or in tail.	To <i>B</i> for life, or in tail.	To <i>C</i> for life, or in tail.
Remainder to <i>B</i> and <i>C</i> , as tenants in common, for life, or in tail.	Remainder to <i>A</i> and <i>C</i> , as tenants in common, for life, or in tail.	Remainder to <i>A</i> and <i>B</i> , as tenants in common, for life, or in tail.

Sometimes, indeed generally, remainders are superadded on these cross remainders, so as to cross the remainders between the several persons taking as tenants in common, and make the aliquot parts which they take under each limitation of cross remainders, the subject of another line of remainders; by these means extending the right of each tenant to the share

of his companion in the tenancy. The descriptions attempted to be given of cross remainders between three or more persons, is intended to represent this accumulation of remainders.

When the remainders are limited in this manner, then as to the part taken under each successive remainder, other remainders are superadded, and limited crosswise, to the different persons: thus, in the instance of cross remainders between three persons, the first remainder divides the share of *A* between *B* and *C*, as tenants in common; the next remainder limits cross remainders of the share of *A* as between *B* and *C*; the same distribution of shares takes place between *A* and *C* in the share of *B*, and between *A* and *B* in the share of *C*. Thus, as to the third part of *A*:

A is tenant for life, or in tail; *B* and *C* are remainder-men, as tenants in common for life, or in tail; with remainder as to the sixth part of *B* to *C*, and with the like remainder as to the sixth part of *C* to *B*.

When these remainders are crossed between more than three persons, with the intention that the entire property may finally be enjoyed by one person, then the remainders are multiplied; and one estate in every subdivided part must be added for each distinct person; thus the original shares will, in point of number, be equal to the number of persons taking these shares; and on the first limitation of remainders,

that part will be distributed into subdivided parts among the owners of the other shares; and on each successive remainder, the parts will be multiplied into aliquot parts, by dividing each aliquot part among those who are to take the same as tenants in common.

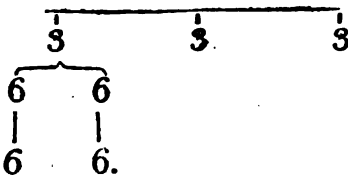
In these cases, the limitations, or the law in its application of them, runs successive changes of estates in remainder in each part, from one person to another, as long as there are two or more persons to divide any and every part between them. By these means, the parts, and subdivided parts, will be increased by a multiplied progression.

As between two donees, the parts are,

Half - - - - - Half.

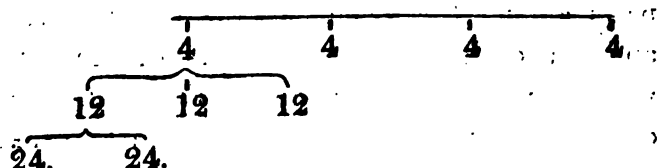
And they will not experience any greater subdivision.

As between three donees, the parts are,



And each third part will be subject to the like subdivision.

As between four donees, the parts are,



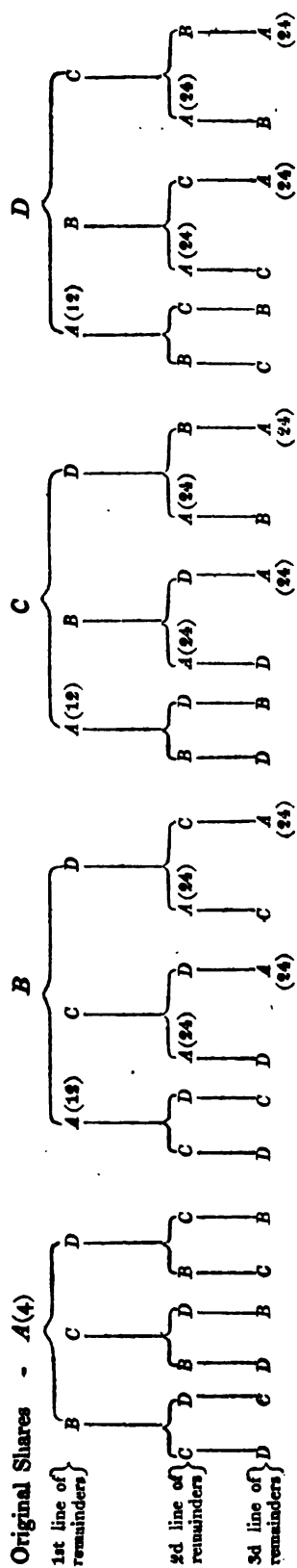
And each fourth part, and every twelfth part, must be subdivided in like manner as the first fourth and first twelfth parts respectively.

It follows, when there are cross remainders between two persons, each may have the entirety by moieties; one moiety by the original gift, and the other moiety under the remainders.

And when there are three cross remainders, and these remainders are continually crossed, then each donee will have the whole; and he will take the same by parts, of different proportions. For instance, *A*, the owner of the first share, will have one third part by original gift; two sixth parts by the first remainder, being one half of the share of the remainder to *B*, and one half of the share of the remainder to *C*; and under the second remainder he will have two further sixth parts; making, by different parts, the entirety of the whole. These parts, however, are taken with an ownership, conferring a right of possession, at different times; and each person takes an estate in each subdivided part, whatever the number of subdivisions may be. This is also the case as to each original donee, with a view to the several shares of all his companions in the tenancy.

To elucidate these observations still further, they shall be applied to cross remainders between four persons.

Thus, suppose four persons to take as tenants in common, with cross remainders between them, and *A* to be one of the donees ; he will be entitled to the several aliquot parts noticed by the number to which the letter *A* is prefixed : thus,



So that *A*, as tenant in common, does, in the first degree, take one fourth, or a quarter part. In the first line of remainders, by distinct parts, and for a distinct estate in each part, he takes three twelfth parts, being another fourth part. In the second line of remainders, he takes six twenty-fourth parts, being another fourth part; and in the last line he takes six twenty-fourth parts, being the remaining fourth part: and his title to the entirety is by sixteen different shares, and one estate in each of these parts. The multiplication of shares will increase according to the number of persons between whom the cross remainders are first limited; increasing the shares in a certain ratio, by the rules of compound multiplication, or rules bearing some analogy to that mode of computation.

The observation arising from this table of cross remainders, is, that in every line of remainders *A* does, in the successive remainders, severally answering to each line, take several parts, equal in the whole to his original aliquot part. The same observation applies to *B*, *C* and *D* respectively.

Thus, under the first line of remainders, operating on the original shares of *B*, *C* and *D*, *A* has three twelfths, or one fourth part; in the second line of remainders he has six twenty-fourth parts, being three twelfth parts, or another fourth part; and under the third line of remain-

ders he has six other twenty-fourth parts, being the remaining fourth part.

From these deductions it appears, that cross remainders are most accurately represented by lines, or degrees of possession; and that the aliquot parts of each person, in each line, are always equal, and no more than equal, to his original share. It is also observable, that the number of aliquot parts in each line will vary according to the number of persons who take shares in the entirety; and that in the last line of remainders, and also in the last line except one, the parts will be the same in number; because, in the last line of remainders, the limitation of each part is, in fact, a limitation of cross remainders as between two persons; and the last line only changes the part between these two persons on the determination of the estate of each other.

On the table of cross remainders it is observable, with reference to the possession, that as between two persons, one of them has at first half, and eventually he may have the whole. One of three persons has at first one third part; afterwards he may have a moiety, or half; and finally, the whole. One of four has at first one fourth part; 2dly, he may have a third; 3dly, he may have one moiety, or half part; and finally, he may have the whole, or, in other terms, the entirety. And so on in like manner in each gradation of numbers, reducing the

original share according to the higher denomination, and adding one as the estate of each donee determines.

The utility of considering and defining remainders of this description may be easily proved ; since, from the nature of cross remainders, practical conclusions, of very material consequence, are to be drawn. The opinion to be formed on the power of alienation, and also on the operation of an assurance, will frequently depend on a perfect solution, and consequently, knowledge of the nature of these remainders. Under cross remainders, each person has an estate extending in different lines, and with different degrees of right to the possession, to every part of the lands which are the subject of these remainders ; consequently, he has a power of alienation, over every part of the land, according to the nature of his estate, and the extent and relative degree of his ownership, in each particular part.

In each part he has only one *estate*, and that estate is either in possession or remainder ; and as to his estates in remainder, he has a remainder in a more immediate, or more remote, degree, according to the order and place in which that estate stands in the table of cross remainders. He has not *two* estates in any *one* part of the land. It follows, that whether he levies a fine or makes a conveyance of the entirety of the land, that fine or conveyance will extend to his estate in each particular part ; and it also follows,

that the estate of every tenant in possession, holding under a limitation with subsisting cross remainders, is succeeded by a remainder or remainders over in favour of other persons.

A consequence flowing from these deductions is, that a tenant in tail with cross remainders cannot of himself, without the concurrence of those in remainder, make a good title to the particular part of which he has the freehold in possession, by any other means than suffering a common recovery of that part.

A fine, feoffment, or other like conveyance of that particular part of the lands, would pass a fee, determinable on the failure of the issue inheritable under the intail. It would not alien the estate of the persons in remainder. To overreach and bar their estate in this part, and exclude their title, a common recovery is absolutely necessary. This is a point deserving attention in practice.

To simplify the case as much as possible, and to show the application of these observations, let it be supposed that *A* and *B* are tenants in tail, with cross remainders between them, and that one of these persons wishes to sell or acquire the fee-simple of his moiety. To do this effectually, he, acting alone, must suffer a recovery. That assurance would bar the remainder existing in his moiety; but a fine, or conveyance by feoffment, lease and release, &c. would merely pass the time of his own estate; and, after his death, and failure of issue, the person

entitled to this moiety, under the limitation of cross remainders, might by entry (unless the remainder was discontinued, and, if discontinued, then by action) recover this moiety. In this particular, the difference between cross remainders, and a limitation to two persons as tenants in tail, with remainder or reversion to them in fee, is deserving of attention. In the former case, each person has *one* estate in different parts, and a power of alienation over each of these parts, according to the order, nature and situation of his estate in that part. In the other case, each person has two estates in the *same identical part*, and no estate whatever in the other part; and for this reason, no power of alienation over that part (*b*).

A consequence, however, of his having several estates in the same part, is, that a fine levied of his moiety, if with proclamations, will complete the title to the fee-simple of that moiety; because the fine will take from the estate-tail the privilege of the issue under the statute *de donis*; and then the time of the estate-tail in *this* moiety will merge in the reversion or remainder in *fee* of the *same* moiety. But, as will afterwards be noticed, a fine is even in this case an ineligible, and sometimes an improper, assurance; since it may accelerate charges on the reversion, and subject the owner to incumbrances, which he might have avoided by suffering a common recovery (*c*).

(*b*) *Church v. Edwards*, 2 Bro. C. C. 180; 3 Convey. 91.

(*c*) 1 Convey. 54.

These observations may be illustrated, and their application rendered more obvious, by apposite examples.

Assume then the facts, that *A*, *B* and *C* are tenants in tail, with cross remainders in tail between them, with reversion in fee to them: a fine by them jointly of *all* the land would effectually extinguish their several estates-tail in possession and remainder, and pass the ownership under the estates-tail and the reversion in fee; for as the fine of each person extends over all the land, it will bar his estate in every part. By these means, *ceteris paribus*, a good title would be made to the entirety of the lands in fee-simple.

So if each of them, separately, levied a fine of the entirety of the land to the same person, that fine would complete the title; because each person would give his estate-tail in possession in a third part, and also his estates-tail in the first and second line of remainders of the other two third parts, and also his reversion in fee in his original third part: but admit that each tenant in tail should levy a fine of the entirety to a distinct person; that fine would operate on the estate-tail and reversion of the conusor of the fine in his particular share; but it would not bar, exclude, or defeat the two lines of remainders in that share; and consequently, after a failure of issue of the conusor in any one of the fines, the others, or their issue or alienee, entitled under the cross remainders, might by their entry, if there was not any discontinuance (and, in case

of a discontinuance, by their action), recover this share of the lands, and would become tenants in tail of the same share; and if each should levy a fine, or suffer a recovery of the original and particular share of which he is tenant in tail in possession, he would not even exclude himself or his issue from the estates in the other parts which he has by way of *remainder*.

From the same principles it follows, that if two of these three tenants in tail should suffer a common recovery of their two third parts, and the other tenant should levy a fine of his third part, the title would be open to the objection that those donees who suffered the recovery still had a remainder in the share of the person who levied the fine; because that fine does not operate with effect, *to bar* these remainders. It also follows, that the recoveries being a bar of all remainders in the two third parts of which they are suffered, the third tenant in tail and his issue have not any existing title in these two parts.

Suppose one of several tenants in tail, with cross remainders, to be desirous of selling his estate throughout the different parts of the lands; and let it be considered what is the proper mode of assurance for transferring these estates.

Of that part of which he is tenant in tail in possession he may suffer a common recovery; and that recovery will be effectual to bar all the

remainders in the share of which he is seized in this manner. A complete title, therefore, may be made to this part of the land. The remaining parts of the land are held for estates by way of remote remainder. Of these parts he alone cannot suffer a recovery, which will be good even *against* his own issue, much less against those in remainder; for as the freehold of these shares is not in his power, his recovery would be defective for want of a good tenant to the writ of entry. By a fine with proclamations, he may dock his estate-tail in the shares of his companions, and convey to a purchaser that degree of interest which he has in those shares; namely, an estate to continue as long as there shall be issue inheritable under the estate-tail. The ownership under that conveyance will be liable to be defeated by the alienation of the other tenants in tail, by their suffering a common recovery: and these observations will show, that in a case with these circumstances, a purchaser cannot rely either on a fine of the whole, or a common recovery of the whole.

He ought to require a recovery of those parts of which the tenant in tail is seized in possession, and a fine with proclamations of those parts of which he is seized by way of remainder, and also a covenant to suffer a common recovery when the estate-tail of these parts shall fall into his possession. In these cases it is taken for granted, that the other tenants in tail would not concur in the alienation. When their concur-

rence can be obtained, a common recovery, duly suffered; or, admitting them to have the immediate reversion, or remainder expectant on their estates-tail, a fine with proclamations, duly levied by all of them, would complete the title to the fee-simple.

On the modes of alienation by a tenant in tail, and on the effect of the assurances made by them, some practical observations will be offered in the chapter on Estates Tail.

A reversion, and even a reversion after an estate-tail, is an estate. It must be preceded only by particular estates derived out of an interest of larger extent; and the particular estates must leave some portion of time, as an ownership, in the grantor. As often, as a disposition of the fee is made, by a conveyance *at the common law*, and by the limitation of the legal estate, either absolutely or on a contingency, (so as in the latter case the limitation may be good *in event*,) there is not any reversion in the person from whom the grant proceeds. The grantor has merely the *possibility of the reversion*, and not any right of immediate ownership. Thus stands the law, as the author of this Essay understands it; but Mr. *Fearne*, in the last edition of his *Essay on Contingent Remainders*, contends, that the owner of the fee, who limits that estate in contingency, has the reversion *till the contingency arises*. But, notwithstanding the arguments urged by that very able writer in support of his observations, there

seem to be very strong grounds to incline to the opinion entertained by former writers, that the fee is *completely in abeyance* (d). And the grantor has that possibility only in those cases in which the fee is in *contingency*, or is for a *qualified or determinable* estate, and while the interest *continues contingent, qualified, or determinable* (e). As soon as the estate becomes absolutely vested, and is neither determinable or qualified, but is a *pure* and simple fee, vested in interest, this possibility ceases.

Also, when under a limitation of a contingent fee, it becomes *impossible* that the estate should vest in interest; or, when under a limitation of a *qualified or determinable* fee, the estate *shall determine*, the person by whom the conveyance was made, will have the estate of the reversion, or as circumstances may require, the actual possession.

On conveyances to uses and devises, in one case, the person who makes the conveyance to uses, and in the other instance, the person who is the testator's heir at law, will have an estate in reversion *till the fee, when limited in contingency, shall vest in interest* (f).

(d) 2 Abstracts, p. 100.

(e) 2 Bl. Com. 107; Perk. § 87; 1 Lord Raym. 326; 1 Inst. 342; Litt. § 646, 647; *Lane v. Hill*, Godb. 368.

(f) As to conveyances to uses, *Davis v. Speed*, Carth. 262; 1 Vin. Abr. 206. pl. 10; *Took v. Glascock*, Saund. 260; *Fennick v. Mitford*, 1 Leon. 182; *Earl Bedford's case*, Poph. 3. As to devises, *Carter v. Barnardiston*, 1 P. W. 505; 1 Vin. Abr. 106, pl. 15; *Hurst v. Winchelsea*, 2 Burr. 879; 1 Black. Rep. 187. As to copyholds, 6 Vin. 297.

When, on a conveyance in fee to uses, the use of the fee or ultimate estate is not limited so as to be vested in interest; or is limited to the right heirs of the person who conveys the estate to serve the uses, it is said, albeit he departs with the whole estate, he *hath a reversion*. It certainly would be more accurate, and more correspondent with the common law, to say he hath an estate in the nature and with the *qualities* of a reversion. This learning depends on the practice of courts of equity respecting uses in their fiduciary state; and Lord *Kenyon's* decision in *Crowe v. Baldwere*, cited in a subsequent page, may with great propriety be referred to this principle. And the same learning is elucidated and fully explained in *Abbot v. Burton* (ff), by Ch. *Trevor*.

In short, by means of the limitation to the use of the right heirs of the grantor, or under the estate which he takes by resulting use, he hath a *new estate*, with all the qualities, for the purposes of descent, of the old *dominion* or use. This is the sound distinction; it is founded on the rules of equity, as they existed antecedent to the statute for transferring uses into possession, and were incorporated into the law by the provisions of that statute, when the statute gave to estates, arising from uses changed into estates, the like qualities as were annexed to the use in its fiduciary state.

It is of the utmost importance to treasure in

(ff) 11 Mod. 181.

the mind the proposition, that when the fee is not limited, or is limited, and that limitation fails of effect, there is a reversion in the grantor; and that when no disposition is made of the fee, or the disposition which is made fails of effect, the grantor or his heir has an estate, which, from the extent and perpetuity of his ownership, will enable him to limit with effect as many particular estates (and under this term estates-tail are included) as he pleases; subject only to be defeated by a common recovery, regularly suffered by the person who has an estate-tail in possession, or by the owner of a remote estate-tail, when he prevails on the tenant of the immediate freehold to join with him in suffering a common recovery. There are a few exceptions in restraint of this power of tenants in tail, enacted by the statute laws. Thus, women tenants in tail of the gift of their husbands or their ancestors, and tenants in tail of the gift of the crown for services performed, are, while the reversion remains in the crown, precluded from barring the issue and the remainders (*g*); and even at the common law a common recovery would not bar a reversion or remainder in the crown, or any estate more remote than the estate of the crown, when the crown has a remainder. But if a grant be made to the crown fraudulently, with an intention to abridge the power of alienation by tenant in tail, the grant, as being fraudulent, would be void, and disappoint the intention.

(*g*) 1. *Convey.* p. 146.

In the same land there may at the same time be an estate in *possession*, and one estate or several estates in *remainder*, and an estate in reversion.

When the estate in possession is determined, the estate in remainder, if there be any, otherwise the estate in reversion, will become an estate in possession, with priority as to the estates in remainder, when there are several, according to the order in which they are limited.

Remainders must always take effect in regular course and in succession, according to the order in which the remainders are limited, and without any interval: and no remainder can take effect in possession, otherwise than on the regular determination of the estate by which it is immediately preceded.

Whenever a remainder is to be accelerated, or take priority over a particular estate, this end must be accomplished under the learning of executory devises or shifting uses. For this purpose it is the executory devise, or shifting or springing use, and not the quality of the estate as a remainder, which produces the operation of the cesser of the particular estate, or the acceleration of the remainder.

Any other interest already created, or a new interest, might have been substituted, and with equal effect, instead of the remainder, in the place of the particular estate.

An interest in possession, and an interest in

remainder or reversion, are several parts of the same estate (*h*). When there are a particular estate and a remainder, the several limitations give distinct interests to the persons to whom these limitations are made.

These interests (different as they are in their nature) and also a reversion, are, with reference to the person by whom the limitations are made, and the connection and relative situation of the tenants, several parts of the same estate.

Estates are said to be in remainder or reversion, according to the relative situation they bear to each other.

The interest which, as to one man, is an estate in remainder, may, as to another person, be an estate in reversion. Thus *A* leases to *B* for life, with remainder to *C* in fee, and *C* leases to *D* for life; the estate of *C* is still a remainder in reference to the estate of *B*. In reference to the estate of *D* it is a reversion.

So an estate which, as to one person, is an estate in possession or a particular estate, may, as to another person, be an estate in reversion; and consequently there may be two reversions in the same land. As if *A* lease to *B* for life, *B* has the possession, and *A* the reversion, as between themselves; and if *B* lease to *C*, then, as between *B* and *C*, *C* has the possession, and *B* a reversion: hence the doctrine of privity of estate.

When a person grants as much time as or

(*h*) 1 Inst. 143 a; 2 Black. Rep. 164.

more time than he has in the land, though he professes to make the grant by way of lease, the instrument will operate as an assignment (i).

So when there is an estate for life, with several limitations, giving concurrent or cotemporary fees, the latter to be substituted in the place of the former, in case the former shall not vest in interest, as in *Loddington* and *Kime* (k); the interest which passes by each of these limitations is a *remainder* as to the preceding particular estate, though the several fees are not remainders as to each other.

Again, these estates, with reference to one another, are said to be *preceding* or *expectant* and *depending*; *mediate* or *intervening*, and *immediate*, *original* or *primitive*, and not *original* or *derivative*.

An estate which gives the right of enjoyment at a time prior to another, is called a *preceding* estate, in reference to the more remote estate; because the latter estate is to give the right of enjoyment at some future time.

And when it is said that an estate is immediately preceding another, it must be understood that there is not any *mediate* or *intervening* estate.

An estate which gives the right of enjoyment on the determination of a preceding estate, is, with reference to that estate, said to be ex-

(i) 2 Convey. p. 124.

(k) 1 Lord Raym. 208; *Southby v. Stonehouse*, 2 Ves. 610; *infra*, ch. Fee.

Also, when tenant for life grants a rent-charge to another and his heirs generally (*n*), the grantee under the limitation would have a fee-simple, if the grantor had an interest sufficiently extensive to warrant an estate of that duration; but the estate of the grantee will continue only during the life-time of the grantor, unless the grant be confirmed by the reversioner or remainder-man. The interest which the grantee has, does, as to himself and all persons claiming under him, partake of the nature, and has all the qualities of a *fee-simple, sed quære*, till it is determined by the death of the *tenant for life*. It may therefore be confirmed as a grant in fee. If there be a fee before confirmation, it arises from the learning of estoppels, and is one of the anomalies of the law.

And it may be concluded to be a general rule, that an estate of a freehold interest cannot arise out of an estate of a chattel quality (*o*).

In some cases, as will appear under the chapter on Estates for Years, such construction will be made as will give effect to the intention, as near as may be: but a rent granted for an estate of freehold, cannot issue out of lands held for years, though the charge be on some lands held for an *estate of freehold*, and on other lands held for a *term of years*. For one entire rent cannot be a freehold out of Blackacre (in which there is an estate of freehold), and a chattel

(*n*) 1 Inst. 301 a; 1 Rep. 147.

(*o*) *Butt's case*, 7 Rep. 25; 2 Abstr. 1.

out of Whiteacre (in which there is an estate of a chattel quality) ; but there will be a freehold estate in the rent; and the lands held for the chattel interest may be charged with a *distress* for the rent, though they cannot be charged with the rent itself (*p*).

The remedy by assize for recovery of rents induced this consequence.

In practice, this difficulty is avoided, by granting the rent-charge *out of the freehold* land, and *demising* the freehold land, and *demising or assigning* the *leasehold* lands for a *term of years*, upon trusts *for securing the annuity*; or by granting the annuity for years, to be issuing out of the freehold and leasehold lands ; and, to avoid the question, whether a rent-charge for life can be transmissible to executors and administrators, the practice of granting rent-charges, even out of freehold lands for years determinable on lives, instead of granting them for the lives, is become very general.

An absolute estate (*q*) is an interest not subject to any qualification or collateral determination by which it may be determined, or condition by which it may be defeated.

An estate of this quality will, in point of duration, continue to the utmost period of time to which it is extended by the limitation or gift.

An absolute estate depends wholly on the words of direct limitation. The epithet *absolute*, is used to distinguish an estate extended

(*p*) 7 Rep. 25.

(*q*) 1 Inst. 1 b.

to any given time, without any condition to defeat, or collateral limitation to determine the estate in the mean time, from an estate subject to a condition or collateral limitation. The term absolute is of the same signification with the word pure, or *simple*,—a word which expresses that the estate is not determinable by any event besides the event marked by the clause of limitation.

These observations apply to all the variety of estates which give an interest of any duration; and all estates give an interest of some duration, unless they are estates at will.

An estate to a man and his heirs for ever, generally, is a simple, pure, and absolute estate.

Again, an estate for twenty years, and which in point of limitation will certainly continue to the end of that period, is of the like quality; because that time may not be abridged by any event expressed in any clause of condition or collateral determination, or implied by law.

In this sense, an estate which is absolute differs from

A *determinable* estate, which, according to the express terms of the limitation thereof, when it is first taken, or the construction of law on the nature of the estate after it is created, may determine, by some event, before the period shall be completed through which it is extended, and during which it may continue.

An estate to *A* and his heirs, tenants of the manor of *Date*, is a determinable estate.

Though in point of duration and extent of time, the right of holding the land, in virtue of the limitation to the heirs, may continue for ever, the estate which passes by this limitation is subject to be determined by the event marked by the words of qualification.

Also, an estate to *A*, *during her widowhood*, is a determinable estate. In construction of law she has an estate *for life*, determinable on her marriage: her marriage will put an end to her estate sooner than it would otherwise expire: on that account her estate is classed among determinable interests.

Also, when a lease is made to *B* for twenty years, if *A* should live so long, the period of enjoyment under that title may be shortened by the death of *A* in the mean time; and therefore a determinable estate passes by a lease in these terms.

Every particular estate is, from its nature, necessarily a determinable one; but those estates alone which have, by limitation, a collateral determination annexed to the disposition of the land, or which, from the nature of the original estate, fall within the description, according to the common acceptance of the term, are the objects of the present remarks.

The terms *absolute* and *determinable* are contrasted with the term *conditional*; and

A *conditional* estate may, by reason of the condition annexed to the same, be defeated

before it shall have completed the period for which it may continue under the limitation.

A grant to *A* for twenty years, provided that if *C* should pay 20*l.* to *A* on the first day of next *May*, the term shall cease, is at first an estate on condition, and not an absolute estate.

Suppose the estate to be absolute, it would continue under the stipulation of the parties to the end of the twenty years; but as a condition is annexed to the estate, to defeat it before the end of that term, by effluxion of time, in case the event marked by the condition should arise within the term, the estate is subject to a condition, and not absolute.

The quality which gives to an estate the denomination of determinable or conditional is, whilst annexed to the estate, so incompatible and wholly inconsistent with a simple, a pure, or an absolute estate, that the existence of the one quality negatives the other. But some estates, which are determinable or conditional, may *eventually* become *absolute*: thus an estate to *A*, subject to be void on payment of a sum on a given day, will become absolute by default in payment of the money on that day.

Also, an estate to *A*, or to *A* and his *heirs*, till *B* shall return from Rome, will become *absolute*, by the death of *B*, before his return; since it becomes impossible that the estate should determine by the event fixed on for the collateral determination of the estate.

Also, an estate which is conditional may become simple, or absolute, by release of the condition ; or a determinable estate may become simple, and absolute, by conformation, or release from the person interested in taking advantage of this collateral quality.

And a determinable *estate-tail* will become an absolute fee-simple, by a recovery duly suffered by the tenant in tail ; since the recovery will bar all conditions and collateral limitations annexed to the estate-tail (*r*).

It is sometimes a question of construction, whether certain words are of limitation or of condition : when they are of limitation, they circumscribe the continuance of the estate, and mark the period which is to determine the estate ; when they are of condition, they render the estate liable to be defeated, in case the event expressed in the condition should arise before the determination of the estate. The instances in which this question can arise in deeds are not very numerous. The following is the most remarkable case which has occurred :

A lease was made to a widow for forty years, with the words, in Latin, added to the limitation : “ under this condition, that she shall so long continue a widow, and inhabit the premises.” She died within the term, and, according to *Moor*, it was held that the term *was not*

(*r*) *Driver v. Edgar*, Cowp. 379 ; *Benson and Hodson*, 1 Mod. 108 ; *Page v. Hayward*, 2 Salk. 570.

determined by her death, but transmitted to her executors (rr).

According to the opinion of *Popham* and *Clench*, had the word "if" been omitted, the superadded clause would have been clearly a condition; and had the words "under this condition, that," &c. been omitted, the superadded words would have formed part of the limitation. According to *Goldsborough* (s), the whole clause was considered to be insensible, and for that reason the term was held to continue.

But the question, whether words are of limitation or condition, more frequently arises in construing wills. In these instances the question is, whether the estate is to commence on the contingency; or is to vest immediately in interest, subject to be defeated in the event expressed as a condition annexed to the estate (t).

When one has the right of enjoyment solely, he is said to have a sole or several estate; to distinguish his interest from a joint-tenancy; and he is said to have the possession of the land separately by himself, to distinguish his right from a tenancy in common, or in joint-tenancy, or coparcenary, or by entireties.

Even a tenant in common has a sole or several estate in his share; there is a severalty

(rr) *Sawyer v. Hardy*, Moor, 400, pl. 525.

(s) *Goldsb.* 179; 10 Vin. Abr. 222.

(t) *Doe v. Nowell*, 1 Mau. & Selw. 327; *Spring v. Caesar*, Sir W. Jones, 389.

of seisin, as to each share, though there is a community of possession between the several part owners.

Tenancy *by entreties* (*u*) is when husband and wife take an estate to themselves jointly, by grant or devise, or limitation of use, made to them *during coverture*, or by a grant, &c. to them, which is *in fieri* at the time of their marriage, and completed, by livery of seisin or attornment, during the coverture (*x*).

The husband and wife have not either a joint estate, a sole or several estate, nor even an estate in common. From the unity of their persons by marriage, they have the estate entirely as one individual, and on the death of one of them, the entire tenement will, for all the estate of which they are seised in this manner, belong to the survivor, without the power of alienation or forfeiture (*y*) of either alone, to prejudice the right of the other.

And this tenancy may be of an estate in tail, as well as an estate in fee-simple, or of mere freehold.

In the accounts of this tenancy it is stated,

(*u*) 5 Term Rep. 654; Litt. § 291; 1 Inst. 187; *Greenely's case*, 8 Rep. 71 b; *Beaumont's case*, 9 Rep. 138; *Owen and Morgan's case*, 3 Rep. 5; *Clithero and Franklin*, 2 Salk. 568; Hob. 3; 1 Inst. 112. 187; *Fearne*, 48; 2 Vern. 120; 2 Black. Rep. 211; Com. Dig. Est. K. 1; *Plowd. Com.* 483; 1 Inst. 187 a. b; *Symond's case*, Mo. 92; *Moody v. Moody*, Ambl. 649.

(*x*) *Plow. Com.* 483; 1 Inst. 187 a. b; 310 a.

(*y*) 1 Inst. 187 b.

that the husband and wife must take *jointly*; and this position seems well founded. It is the legal notion of the unity of two persons, who are husband and wife, which gives occasion to the construction of an *entirety* of interest on their tenancy.

In point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do (z).

Also, when a grant is made to a husband and his wife and a third person, as tenants in common, each of these three persons will severally have a separate and distinct interest in, and tenancy of, a third part.

When an estate is limited to a husband and wife and a third person, jointly, then, as against the third person, the husband and wife have, in point of ownership, a moiety only; and of this moiety, and also of the other moiety, in case it should become their property by survivorship, the husband and wife will be tenants by entireties; and as to the whole, the husband and wife and third person will be joint-tenants (a).

When husband and wife are tenants by

(z) 1 Inst. 187 b. S. P.

(a) Litt. § 291; 1 Inst. 107. 187; *Back v. Andrews*, 2 Vern. 120.

entireties in fee, and the wife survives, so that she becomes solely seised, and dies intestate, her heir, it should seem, would take the fee by descent, and the heirs of the blood of the husband, merely as such, would be excluded.

But it is more difficult to ascertain what would be the course of descent of a fee taken by the heir of their two bodies, under a descent to him of an estate-tail to his father and mother, and the heirs of their two bodies, and which he had by common recovery enlarged into a fee-simple.

He took by descent from his father and mother; each of his parents was equally the purchasing ancestor. The difficulty is to decide whether the heir of the blood of each parent, or the heir of the blood of the survivor of them, considered as a surviving joint-tenant, should be admitted into the succession.

The probability is, that the decision would, from analogy, be in favour of the heirs of the blood of the survivor.

In *Finch's Law* (b) it is said, a man and feme sole have a villein, and *afterwards intermarry*, and the villein purchase lands, they shall not have the lands by *entireties*, but by *moieties*, jointly or in common, as they had the villein.

This point is referred to the maxim, 'things are construed according to that which was the cause thereof;' and the point is noticed as it

may lead to conclusions on the execution of uses in favour of husband and wife, and as a contrasted case to the lease by coparceners, who reserve a rent, and sell the reversion, retaining the rent; for though they were coparceners of the reversion before alienation, they will, after alienation, be joint-tenants of the rent.

And if an use be limited to a man and his intended wife, preparatory to their marriage, and they intermarry, they would be joint-tenants, and not tenants by entireties (*c*).

When husband and wife are seised by entireties for life, with remainder to the husband in tail, his fine divests the estate of his wife, and turns it to a right of entry (*d*).

This conclusion flows from the rules of the common law; namely, the power which the husband had over the freehold of his wife.

An alienation by the husband alone, in the life-time of the wife, will, in the event of his surviving his wife, be good for the share of himself and his wife.

In this respect, also, there is a difference between a tenancy by entireties and a joint-tenancy. A joint-tenant cannot do more than convey the aliquot part which is his share, individually.

When the husband and wife are tenants in tail by entireties (*e*), and when the husband

(*c*) 1 Inst. 187 b.

(*d*) *Bustard's case*, 4 Rep. 121.

(*e*) *Beaumont's case*, 9 Rep. 138; *Baker and Willis*, Cro. Car. 471; 2 Abstr. 44.

alone aliens by a fine with proclamations, and dies in the life-time of his wife, the fine excludes the issue in tail from taking as heirs under the intail, and yet the wife retains all her ownership and powers of alienation as donee in tail, in like manner as if the fine had not been levied. She may suffer a common recovery, and bar the remainders, &c. but on her death the estate, deprived of its descendible quality under the intail, may descend to her general heir as heir, but cannot descend to her issue as heirs in tail; unless, indeed, (and this circumstance does not disprove the point, but merely adds a qualification to it,) there be a confirmation to her and the heirs in tail, so as to revive the old, or rather create a new estate-tail.

And when husband and wife and a third person are joint-tenants, as between themselves, and the husband and wife are tenants by entireties, as between themselves, and the husband makes a feoffment of the entirety in the life-time of his wife and joint-tenant, and then the husband dies, the wife and the other joint-tenant are joint-tenants of the right (*f*); and if she die in the life-time of the other joint-tenant, the right will vest in him by survivorship.

But if the husband had made a feoffment of one moiety only, and he and his wife had died, the right to their moiety would have survived to the joint-tenant; for as against the joint-

(*f*) 1 Inst. 187 b. 188 a.

tenant, the feoffment of the husband is neither void or voidable, though as against the wife and her heir, it is voidable (*g*).

But if the wife had survived and entered, she would have become joint-tenant with her companion in the tenancy, unless he had severed the tenancy.

A husband also, who is tenant by entireties with his wife, and joint-tenant with a third person, may take a release of the share of the third person, and such release will be good, without words of inheritance.

Joint-tenancy is when several persons have any subject of property jointly between them, in equal shares, by purchase (*h*). During the time they are to hold jointly, neither of them has an estate in any particular part. Each has the whole and every part, with benefit of survivorship, unless the tenancy be severed. In the ancient language of the law, joint-tenants hold *per my et per tout*.

The real distinction is, joint-tenants have the whole for the purpose of tenure and survivorship, while, for the purpose of immediate alienation, each has only a particular part. Joint-tenants, while they are joint-tenants, have not any devisable interest; and a devise by one of several joint-tenants, while the joint-tenancy is in force, will be void, although he survives his companion (*i*).

(*g*) 1 Inst. 188 a.

(*h*) Litt. § 291; 1 Inst. 188 b.

(*i*) *Swift v. Roberts*, 3 Burr. 1488; Ambl. 617.

That a will may operate even for any part, it must be made, or there must be a republication of the will, after the tenancy becomes sole by survivorship, release, &c.

The case of a husband and wife who hold jointly with a third person, may seem an exception to the proposition, that the tenants must hold by equal shares. In truth it is not one. The law, when left to its genuine construction, considers the husband and wife as one person; consequently, the terms of the description in their legal sense, with reference to the legal unity of the persons of a husband and wife, apply directly to this particular case.

This tenancy may, by the act of either of the parties, be changed into a tenancy in common; and by survivorship before the joint-tenancy is severed, it may be changed into a sole or several tenancy.

Tenancy in coparcenary, is when several persons have, by *descent*, a tenement among them in common, by equal proportions, as coheirs in the same degree, or in unequal proportions, as coheirs in different degrees.

Their right to the possession is in common, and they have several and distinct estates.

Each of them has a power of alienation over his or her share, in the same manner as a tenant in common has over his share.

Their estates are held in coparcenary, so long only as they claim by descent. As soon as any part is severed, by conveyance, from the

title of the remaining part, the part so severed will be held in common.

Between the alienee and the other coparceners, there will be a tenancy in common. The remaining coparceners will, as between themselves, continue to hold in coparcenary. This is material to the doctrine of descent, and sometimes to the operation of a particular assurance; for tenants in common cannot release to each other; they must convey (*k*). But coparceners or joint-tenants may release to each other (*l*). One coparcener may also enfeoff another; but a joint-tenant cannot make a feoffment to his companion in the tenancy (*m*). All that is to be understood by the latter proposition, is, that an instrument in the form of a feoffment cannot operate in that mode. But if there be a deed, the instrument may, under the liberal construction now applied to assurances, be pleaded as a release (*n*.) It is observable, however, that one joint-tenant may lease or grant for a particular estate to his companion (*o*).

According to *Finch* (*oo*), a rent annexed to a lease by coparceners, will, by a sale of the reversion, retaining the rent, become a rent in joint-tenancy. This change of tenancy is accounted for on the maxim, "the cause ceasing,

(*k*) Brooke, Feoffment, pl. 45; 1 Inst. 200.

(*l*) 1 Inst. 163 a. 196 b. (*m*) Ib.

(*n*) Brooke, Confirmation, pl. 11.

(*o*) 1 Inst. 186 a. 193 a.

(*oo*) Finch, Ley. p. 9.

the effect doth likewise cease." It is one of the anomalies of law.

Tenancy in common is, when several persons have several distinct estates, either of the same or of a different quantity, in any subject of property, in equal or unequal shares, and either by the same act or by several acts.

A tenancy in common differs from a joint-tenancy in this respect : joint-tenants have one estate in the whole, and no estate in any particular part : they have the power of alienation over their respective aliquot parts, and, by exercising that power, may give a separate and distinct right to their particular parts. Tenants in common have several and distinct estates in their respective parts : hence the difference in the several modes of assurance by them. Each tenant in common has, in contemplation of law, a distinct tenement, a distinct freehold, &c.

Nor should it be passed over without observation, that the *same* estate may, as to part of the period limited for its duration, partake of a joint-tenancy ; and, as to other parts, be a tenancy in common. This state of tenancy may exist, although the estate passes by one limitation. An example occurs in the instance of a gift to two persons, who may not lawfully intermarry, and their heirs of their bodies, and is peculiar to this instance, and other limitations in tail similarly circumstanced.

In their life-time, and till severance, the donees are joint-tenants of the freehold ; so that unless a

severance be made of their tenancy, the freehold will, on the death of one of them, remain with the other. Still, however, the several persons have several and distinct inheritances to some purposes; for, after the death of one of them, the part of that person (subject to a right in the survivor to enjoy the same for his life) will descend to the heirs of the body of the deceased donee; and the heirs of each person (unless there be a limitation by way of cross-remainders) will be entitled to that part only which belonged to his ancestor, the donee.

Perhaps it may be said, that the construction of the law on a limitation in these terms is, that the donees have several and distinct estates: one for the lives of the donees, the other in tail, expectant, as to the moiety of each donee, on the estate of freehold, and applicable from time to time to his particular part.

For the conclusion that the donees have more than one estate, there is not any reason or authority. The case of *King and Edwards*(*p*) seems an authority for the positions advanced in this Essay.

At first view, the case of *Owen and Morgan*(*q*), which had for its subject a title derived under a gift to a man and his wife, and the heirs of the body of the husband, seems to negative these positions. The particular circumstances of that case, called for the decision; and the reasons offered in illustration of this case, so

(*p*) Cro. Car. 320.

(*q*) 3 Rep. 5.

far from proving that the limitation to the heirs of the body gave the husband an estate in remainder, expressly negatives such conclusion; for it states, that for the cause there assigned, it was as much (meaning the same) as if the husband had had a remainder in tail, expectant on an estate for life.

And Mr. *Fearne* (*r*) observes, that in instances of this sort, the estates are so far executed in, or blended with, the possession, as not to be grantable away from or without the freehold, by way of *remainder*. And in the case of the *Queen v. Marquis of Winchester*, which seems to be decisive of the point under consideration, a gift was to *Lionel Norries* and *Ann Mills*, and the heirs of the body of the said *Lionel*; and it was held, that a common recovery suffered by him alone, in the life-time of *Ann Mills*, with *single voucher*, was good for one moiety; so that this case must have been determined on the ground, that in one moiety of the land he had an estate-tail in possession, as part of and connected with his estate of freehold, and not by way of remainder as a distinct interest. When the inheritance is distinct from the freehold, the intail cannot be barred, unless there be a voucher of the donee in tail, or of the heir in tail, and a voucher over.

From these determinations, and in particular for the reasons assigned for the decision of

(*r*) Essay on Remainders, p. 41; *Wiscot's case*, 2 Rep. 41; 3 Rep. 1.

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Owen and Morgan (s), it must be concluded that the last-mentioned case owes its decision to the fact, that the husband had his estate by way of possession, and not of remainder. *Clithero v. Franklin* (t), which recognizes *Owen and Morgan* to be an unquestionable authority, does not, by its determination, carry the law one point farther. For in *Clithero v. Franklin*, the inheritance was clearly and expressly limited by way of remainder, and distinct from the estate of freehold.

An estate is then said to arise *by limitation of the legal estate*, when it is conveyed by some or one of those modes of assurance, which wholly depend for effect on the rules of the common law, and have their effect entirely under these rules; and,

By limitation of use, when the estate arises by *bargain and sale enrolled*; or a *covenant to stand seised to uses* (being assurances which have their effect, as giving a legal right and a legal estate, wholly and merely by the Statute of Uses); or by limitation of use, on some conveyance at common law, or will. In cases of the latter description, the assurance gives a legal title, through the medium and by the operation of the Statute of Uses.

An use (u) was formerly the right, in equity, of having a conveyance of the land, or a collateral interest out of the land, *for some time*.

(s) 3 Rep. 5.

(t) 2 Salk. 568.

(u) 2 Eunomus, 103.

Even at this day this use is, in most cases, executed into estate by the act of the law, without any act of the party ; or mediately only by the act of the party.

The doctrine of uses, forms a copious and intricate branch of legal knowledge, too extensive to be considered at large in the present Work.

Frequent reference must, of necessity, be made to this doctrine. Many of the most curious distinctions in our books, are founded on the difference between an estate taken by the common law, and estates taken through the medium of a conveyance to uses, or under uses without any conveyance : and it will be worth the inquiry to go so far into the learning on uses, as may be a means of rendering intelligible the cases to be noticed in different parts of this Essay, respecting the measure and quantity of estates.

Prior to the statute (*x*) which transferred the estate to the use, or, in other terms, the use into estate, the use consisted in a confidence reposed by one person in another, that he would suffer him, or some person whom he had named or should name, to take the profits of the land, till a conveyance should be made thereof, according to the trusts ; and that he would make a conveyance of the land when that conveyance should be required from him. And if the feoffee or other donee refused to

(*x*) 27 Hen. VIII. c. 10.

permit the profits to be taken by the person on whose behalf he was entrusted to make, when required, a conveyance to him, the Court of Chancery, (in which alone matters of this sort, as depending on conscience, were properly cognizable) would compel him to do that which, in honesty and good faith, he ought to have done without any coercion or suit.

It must be understood, that, in the several instances which have been noticed, the *cestui que use* was entitled to the *use* of the land, or to some interest out of the land, as a rent-charge. As often as the trust was for the payment of debts, or for like purposes, to be performed by the trustee, no person could call for a conveyance of the land. No creditor was entitled to the use of the land. His only remedy was, to require a sale, and by that means enforce a performance of the trusts. Hence the difference at the common law, between uses and trusts. Every use was a trust, but every trust was not necessarily an *use*. And, even at this day, those trusts which are not uses, are left unaffected by the statute of 27 Hen. VIII. and remain subject to the jurisdiction of courts of equity. They never can become legal estates, except through the medium of a conveyance, even in those instances in which they can, from their nature, be the subject of a conveyance.

The law, as distinguished from equity (*y*), did not take any notice of the interest, even

(y) Kielw. 42 b, 1 and 314. 318.

of the *cestui que use*, or person entitled to take the profits and call for the conveyance.

When he obtained the possession, he was deemed tenant at will to the trustee, as the owner of the legal estate; and the trustee might eject the *cestui que use* from the possession, whenever he thought proper: and an action of trespass might have been maintained against the *cestui que use*, for a continuance in possession against the will of his trustee (z).

If the trustee thought proper to take the profits, then, in point of law, the *cestui que use* had not any right to interrupt him. And if the *cestui que use* made a lease, which did not conclude the lessee by estoppel, the plea of *nil habuit in tenementis*, was a bar to his action of debt for the rent, in like manner as it was to the action of a mere stranger, or person who had not any estate in the land, or in the use of the land (a).

So when the *cestui que use* levied a fine, without first acquiring the legal freehold by disseisin, or by a feoffment operating by disseisin, the fine was void, on the ground that *partes finis nihil habuerunt tempore finis levati* (b).

Also, at this day, a fine by *cestui que trust*, without first acquiring the freehold, cannot

(z) Shep. Touch. 502.

(a) Plow. 349; 15 Hen. 7, 1 Co. 140 a; 1 And. 320; Barr. on the Statutes, 388; 1 And. 320; 2 H. 7. 4; Corbet's case, 2 And. 18.

(b) 1 Burr. 95; Sand. 309; 1 Cruise, 290. 310; 27 H. 8. 20; Bac. on Uses, 6, 7; See *Basket and Pierce*, 1 Vern. 226.

operate as a bar by *nonclaim* against the trustee, or other owner of the legal estate, whatever may be the operation of such fine as between *cestuis que trust* having conflicting rights (*c*).

The general impression, prior to *Cholmondeley v. Clinton*, was, that a fine duly levied, by a person who claimed to be the equitable owner, and had the possession, would, except as against an infant, and except in some other particular instances, operate by way of nonclaim in bar to those who had the right to be the owners of this equitable interest (*d*).

A trustee, (and whoever has the possession during the infancy of an equitable owner, is deemed a trustee for the infant,) or a mortgagor or mortgagee, cannot, by a fine, bar those who stand in the contrasted relation of *cestui que trust*, mortgagor, or mortgagee.

At law (*e*), the *cestui que use* had not either *jus in re* nor *jus ad rem*; in plain English, neither any estate in the land, or title to the same, nor any remedy to enforce an observance of the trust on the part of the trustee.

His only remedy was in the Court of Chancery; and in that court he might commence his suit by subpoena, a writ requiring the party, under a stated penalty, to appear in the Court of Chancery, and answer the complaint of the aggrieved party.

(*c*) *Basket v. Pierce*, 1 Vern. 226; *Cholmondeley v. Clinton*, 2 Meriv. 173.

(*d*) 2 Freem. 21; 2 Vern. 189; Cruise on Fines, 187.

(*e*) 1 And. 20.

All questions on these uses or confidences, were the subject of discussion, investigation, and decision, in the Court of Chancery. That court administered justice to the parties agreeably to the merits of their respective cases, without, at all times, regarding the rule which the law would have applied to a similar case, on a question relating to a legal estate, with the like circumstances.

The judges of the ordinary courts, were bound to observe the rules of the common law, however strict.

They were not at liberty to take into their consideration, the equitable circumstances of which the several cases of the respective claimants were constituted.

The rules of the common law were adopted on reasons, and many of them of feudal origin, which at some period rendered it necessary that these rules should be introduced into the system of our tenures or jurisprudence; and to avoid inconveniencies, which could not arise in consequence of a departure from those rules by courts of equity, in deciding questions of use. Hence arose a difference in the decisions of the several courts, on the subject of the several matters within their respective jurisdictions.

Inconveniencies which might arise by means of the limitation of the legal estate, contrary to the rules of the common law, could not arise from similar limitations of the use.

And the want of a tenant of the immediate freehold, or the notoriety of change of ownership through the form of livery of seisin, attornment, &c. &c. were not of any importance in application to uses, when they were trusts.

The intention of the parties frequently required that courts of equity should recede from the rules of the common law applicable to estates. These courts complied with that intention, more readily, because, from the different rights conferred by the *estate*, and the *use* of the estate (*f*), the several cases were not within a parity of reason.

Hence, also, the difference in modern law, between legal estates and trust estates: that in limitations of trust, the freehold may be limited to commence *in futuro*; and that a contingent remainder of a trust cannot be destroyed by the alienation, surrender, or merger of the particular estate. No discontinuance can be effected by an equitable owner, as such.

So that a remainder of a trust may have effect, notwithstanding the determination of the prior particular estate (*g*), before the remainder can vest.

But at this day, remainders, owing their effect to uses, must vest before the determination of the prior particular estate, or they will fail of effect.

Hence, also, contrary to the rules of the common law, several persons may be joint-

(*f*) *Hopkins and Hopkins*, Cas. temp. Talb. 44; 1 Atk. 593.

(*g*) *Chapman v. Blissett*, Cas. temp. Talb. 145.

tenants of an use, although they come *in esse* at different periods ; yet if a remainder be limited to several persons as joint-tenants or tenants in common, the use or estate will vest in those persons alone who shall be capable at or before the determination of the prior particular estate. The case of *Mogg v. Mogg*, depends on this rule (*h*).

Many and successive statutes (*i*) were enacted for the regulation of uses, and to prevent injuries to the interests of the lords of the seignory, who lost their fruits of tenure in consequence of dividing the right of taking the profits of the land, from the estate which conferred the legal title of receiving these profits.

The more early statutes were to little purpose: they did not reach the evil. For this reason, a statute (*k*) was passed, by which the *legal estate* was transferred to the *equitable interest* ; or, as it is variously expressed, the use was transferred into estate ; or the possession, in other words the estate, transferred to the use.

By the operation of this statute, the use, to the extent in which the same was affected by the statute, was confounded in the estate ; and the interest, which before the statute was merely equitable, became wholly legal.

Instances of trust, however, still exist, unaffected by that statute ; or exist through the medium of that statute ; because the statute

(*h*) See *infra*, Ch. Freehold.

(*i*) 2 Leon. 16, 17 ; Per *Harper*. (*k*) 27 H. 8. c. 10.

according to the interpretation it has received, affected those uses only which

1st, Were declared of the ownership of estates of a freehold quality ;

2dly, Were uses in the first degree, or in other words, not uses upon uses ;

3dly, Were uses as distinguished from trusts.

This statute enumerates by recital the many mischiefs which arose, from allowing the use to be in one person and the estate to be in another person.

This recital is interesting, as giving a key to the object of the statute.

It states, “ where, by the common laws of this realm, lands, tenements and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient, made *bona fide*, without covin or fraud, yet, nevertheless, divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts ; and also by wills and testaments sometime made by *nude parole* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantily had any good

memory or remembrance, at which times, they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances, by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly, at sundry times, disherited; the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fitz chivalier et pur file marier*, and scanty any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; also, men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries, by trial of such secret wills and uses, have been committed, the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born; and also the profits of waste for a year and a day, of lands of felons attainted, and the lords their escheats thereof; and many other inconveniencies have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; for the extirpating and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors,

heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same ; and then, to the intent that the king's highness, or any other his subjects of this realm, shall not in anywise hereafter by any means or inventions be deceived, damaged or hurt by reason of such trusts, uses or confidences, the statute enacted, that where any person stood or was seised, or at any time thereafter should happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence, or in trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever it be, that in every such case all and every such person and persons, and bodies politic, that had, or thereafter should have, any such use, confidence, or trust in fee simple, fee tail, for term of life or of years, or otherwise, or any use, confidence or trust in remainder or reverter, should stand and be seised, deemed and adjudged in lawful seisin, estate and possession, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates, as they had or should have in use, trust or confidence of or

in the same ; and that the estate, title, right and possession that was in such persons that were or thereafter should be *seised* of any lands, tenements or hereditaments to the use, confidence or trust of any such person or persons, or of any body politic, should be from thenceforth clearly deemed and adjudged to be in him or them that then had, or thereafter should have, such use, confidence or trust, after such quality, manner, form and condition, as they had before in or to the use, confidence or trust that was in them."

There are other provisions in this statute. These provisions, however, are not material to the subject under consideration, any further than as they are afterwards noticed.

To students it must be a task of some difficulty to comprehend the scope of the statute, without some previous assistance. With preparation to enter on any study, and assistance in their progress in it, what cannot they accomplish?

When the rule involving the general principle which governs any doctrine can be discovered, it will be an easy task to attain a clear and comprehensive view of the several cases which form the rule, or arise out of the doctrine to be deduced from the principles of which it is composed.

With a view to lead to a knowledge of the spirit and construction of this statute, a few observations will be added.

The great object of the Legislature in passing the Statute of Uses, was, as is evident from the recital, to reduce the estate of the *cestui que use, in the use*, into an estate in the land; and at the same time to continue to the estate in the land, arising from an estate in the use (*kk*), all those qualities which, prior to that statute, were annexed to the estate in the use; a proposition to be always kept in mind, as accounting for many and various distinctions in which estates arising from uses are governed by rules different from those which prevailed at the common law; and among them,

1. That the first use may give a freehold *in futuro*.

2. That one fee may be defeated by another estate.

3. Or the order of priority be changed by shifting uses or by powers.

4. That several persons taking at different times may be joint-tenants.

5. That estates of freehold may cease, ~~in~~ *facto*, by means of conditional limitations, without entry or claim.

6. That a *new estate* shall be governed in its descent by the right of succession, by which the use would have been regulated.

To answer effectually all the purposes of this enactment, the estate in the land, which before that statute continued in the trustees, to support the estate limited in the use, was transferred to

(*kk*) 2 Leon. 16. *Per Manwood*.

the use; and the estate, which at that time existed in the use of the land, became an estate in the land itself, by the mere operation of the statute, without any entry or other act by the party (l).

The statute executes the use, whether present or future, so as to render it a legal interest (m); and the interest thus executed will be present or future, according to the manner in which the use is limited; and the interest in the use, whether limited to a person in certain, or to a person to be ascertained; or whether limited absolutely, independently of any event, or to take effect eventually, will execute into and become an estate or interest in the land itself; and as an estate or interest in the land, it will, with the difference of being a legal instead of an equitable interest, be of the same quality as it would have been in case it had remained an estate in the use.

Accordingly (n), *Mounson* said, in *Brant's* case, the case which originated the doubt, that the entry of the wife, with commandment of the feoffees to uses, was lawful; and *Harper* was of this opinion (o); *Dyer* (p) urged the contrary; *Mounson*, negative.

The scope of the statute was merely to give a legal right and a legal estate, instead of an equitable one (q); the legal estate arising from

(l) *Green v. Wiseman*, M. 41, 42 Eliz.; Owen, 87; 10 Vin. Abr. 213, pl. 6.

(m) 2 Leon. 168, 179. Per *Manwood*.

(n) 2 Leon. 18.

(o) *Dyer*, 310. b.

(p) 2 Leon. 12, 19.

(q) 1 Atk. 592.

the use to correspond with the equitable ownership (*r*).

The consequence is, that the same qualities which were proper to uses when they were fiduciary, or mere equitable interests, follow them now, since they are executed into estates, or are become legal interests.

By some eminent lawyers it has been understood, that the statute does not annex the legal title to any uses, till these uses give vested interests (*s*). They deduce the consequence, that as often as the use is limited in contingency, an estate in the land, or a *scintilla juris*, commensurate with the quantity of estate in the use, remains in the trustees or feoffees to uses, to supply a seisin to the use, when it shall become a vested interest.

Of those (*t*) who contend that the seisin is transferred to such uses only as give vested interests, it may be asked, how it happens that a limitation to a person unborn, for an interest of freehold quality, is liable to be destroyed or fail of effect as a contingent remainder, unless the person to whom the remainder is limited be born before the determination of all the preceding particular estates of freehold limited by the same deed or instrument? And how it

(*r*) 2 Leon 16. Per *Manwood*.

(*s*) Per *Booth*. See his opinion, in notes to *Shepp. Touch.* 503; *Dyer*, *ubi supra*.

(*t*) *Chudleigh's case*, or *Dillon and Freine*, 1 And. 314; 1 Rep. 120; Poph. 90; 1 Atk. 592.

happens, that, on a conveyance to uses, the fee results (*u*) to the person by whom the conveyance is made, till the person to whom the fee is limited has the capacity, or is in a situation to take the same estate, supposing him not to be capable at the time when the conveyance is made.

Unless the seisin or legal title be transferred to the use, so as to fill the whole measure of time granted to the feoffees, the feoffees must have the time or quantity of interest, which does not pass by means of the statute, to the objects of the declaration of the use; and it would follow, that the times of ownership or estates of the feoffees would be vested, and that the contingent uses could not be destroyed or affected, because the estate in the feoffees to serve these uses, would support the same.

Another reason, of more weighty consideration, may be urged. These interests could not be the objects of the doctrine of contingent remainders, and the destruction of such remainders by the failure, destruction, or determination of the estate necessary to support them!

Whatever may have been the theory of the law, on this point, the established practice of conveyancers negatives the construction that the estate is executed to the person only, and not to the use. All agree that contingent uses give contingent interests in the land or seisin

(*u*) Bacon on Uses, 61.

though some contend that an estate, or a *scintilla juris*, remains in the feoffees, as often as some of the uses declared of their estate are contingent.

It is universally admitted, and is quite clear, that the estate in the use, when it becomes an interest in the land, through the medium and by the operation and effect of the statute, becomes liable to all those rules to which estates, raised by the common law, are liable (*x*), with this distinction; the qualities, (as the liability to be overreached by the exercise of powers; to be shifted, to cease, *ipso facto*, by clauses of cesser, &c. which, by the indulgence of the Court of Chancery, accompanied uses in their fiduciary state,) are not separated from uses when they change their nature, and from an estate in the use of the land, become an estate in the land itself (*y*). The statute, in express terms, enforced the observance of this similitude.

Hence, too, contingent remainders by way of use, must fail of effect, unless they become vested estates before the determination of the particular estates.

Such is the operation of the statute, according to the interpretation which some have given it. This opinion is warranted by the doctrine laid down and ably supported by Mr. *Fearne* (*z*). His opinion, as an individual considering the subject maturely and deliberately in his cham-

(*x*) 2 And. 75.

(*y*) 2 And. 76.

(*z*) On Contingent Remainders, Butler's edit. 288.

ber, and weighing the reason of a decision, with all the circumstances under which a contrary doctrine was advanced, and with the advantage of comparing the theory of the law with its influence on practice, ever has had, and ever will have, great weight and authority with the profession. Let it also be observed, that the opinion he has delivered on this subject, corresponds with the opinion given by the Author of the Treatise of Equity; a book of very considerable merit. The ingenious author of that Treatise (a), refers to the doubt which had existed on this point, and he assumes the point as settled.

The persons who incline to the opinion, or express themselves to the effect, that the estate in the land is not transferred to the use, suppose it to be transferred to the person who hath the estate in the use, in respect of his estate in the use; and hence they infer, that no use can become a legal interest, until there shall be a person in whom, by reason of his existence, and the form in which the limitation to him is expressed, an estate may vest; and that when the estate of the use is divided into portions, and there is a discontinuance of the general estate, the remainder, which is in contingency, may not be recontinued till the trustee, or the tenant of some preceding vested estate, hath, by his entry or his action, reduced the estate to a seisin, to serve and supply the uses, as the period

(a) Tr. of Equity.

at which they may become vested interests and legal estates, shall arrive.

From what source they deduce this doctrine, or by what reasoning they maintain it, does not distinctly appear. A mistaken notion, grounded on decisions pronounced on the law as it stood on the statute of Rich. III. and of course antecedent, in enactment, to the statute of Henry VIII. may have led to this opinion.

The case, which states the necessity of an entry by the feoffees, to recontinue the estate limited to them, to serve the uses, after a discontinuance of that estate, is, perhaps, the authority relied on (*b*). This case, in all probability, relates to the law as it stood before the statute, by which uses are transferred into possession or estate; and applies to those instances, only, in which a power of alienation was given to the *cestui que use* in possession, and his conveyance created a wrongful seisin, in the nature of a discontinuance, and had an effect, in some degree, analogous to that act; and the feoffees were obliged to enter to restore the seisin or estate to themselves, for the benefit of the persons entitled to the use in remainder, or the issue in tail, when tenant in tail discontinued his use (*c*). In a case with these circumstances. the tenant in possession, though he had the

(*b*) Per Hooper and Harris, 1 Leon. 178; 3 Leon. 252; Plow. 351.

(*c*) Per Walmesley, 2 And. 314. 5.

power of disposing of the land (*d*), and a right of giving an estate therein, had not any estate in the land; he merely had an estate in the use: and after a discontinuance, the issue in tail and remainder-men could have nothing more than a right of use for the several estates to which they were entitled.

After the discontinuance, they no longer had the use itself. The person who claimed under the discontinuance, did not hold the estate to their use; he held it for his own use. The right of entry or of action, to recontinue the estate, remained with the feoffees; and it was on them alone that the issue in tail, or remainder-men, could call to exercise that right. The feoffees, on recontinuing the estate by their entry or their action, stood seised to the use of the issue in tail or remainder-men, in the same manner as they would have done in case no discontinuance had taken place. *Periam*, the Chief Baron of the Exchequer, in delivering the reasons of his opinion on *Chudleigh's* case, with reference to contingent uses, limited after the statute, agreed (*e*) that the entry and re-entry of the feoffees is wholly taken away by the intent of the statute.

The case stated in 1 And. 332, and in Moor, 38, 39, in which it was held, that the feoffees might re-enter to restore their seisin to serve the uses, is open to the like observations as are made

(*d*) Plowd. 351.

(*e*) 1 And. 317.

on the case (*ee*) already mentioned. In the case now under consideration, a feoffment was, prior to the statute of 27 Hen. VIII. made to *B*, to the use of the feoffor and his wife, and their heirs of their bodies, and for default of such issue, to the use of the right heirs of the feoffor; and, the feoffor being tenant in tail, he, in 26 Hen. VIII. (which was one year before the passing of the statute of 27 Hen. VIII. c. 10, which transfers the use into estate) levied a fine with proclamations, and died in the 7th Eliz.

The feoffee to uses, entered into the land to revive the uses, and the question was, whether the entry of the feoffee was lawful or not; and the justices agreed that it was lawful in this case, and that all the interest of the feoffee was not taken away by the stat. of 1 Rich. III. nor by the statute of 27 Hen. VIII. They admitted that the fine passed an estate in fee; but, taking it to be clear, that *if the statute of 27 Hen. VIII. had not been enacted*, the feoffee might have lawfully entered and had such estate as the wife had in the use; and that the statute transferred the use into estate only when there was a seisin of the estate, to serve the uses, they concluded that the feoffee must recontinue his seisin and estate, before the use to the wife could arise; and they agreed, that as soon as the feoffee had recontinued his estate, the use arose to the wife by force of the statute, and divested the estate out of the feoffee.

(*ee*) *Brent's case*, Dyer, 339 b.

Delamere's case (*f*) was adjudged accordingly. In that case, also, the feoffment was before the statute of 27 Hen. VIII. though the question was not agitated till the time of 9 Eliz.

The point of law to be collected from the cited cases, is merely that the entry of the feoffees was not taken away by the statute of 27 Hen. VIII. in those instances in which, at the time of passing that statute, the estate of the feoffee was in a third person, by disseisin or discontinuance, so that the estate could not be communicated or executed to the use. In order, to the operation of the statute, it was necessary that there should be an estate to serve the uses. For that reason the use could not arise till the estate was restored to the feoffees. It was, on all sound principles of law, highly reasonable, that the right of entry or of action should not, under such circumstances, be taken from the feoffees or trustees. Unless that right might be prosecuted or enforced by them, no other person could restore the estate; and the wrongful possessor would have profited by his own wrong. There would have been a legislative extinguishment of the right and of the use, by mere interpretation; while the statute, in point of system or intention, interfered with the interests of the feoffees in those instances only in which they had a legal seisin, to serve the uses, to be executed into estate. These observations account for the decisions in the

cited cases. These decisions, however, do not lead to the conclusion, or allow of the inference, that no uses are executed into estate, besides those which give a present fixed interest.

On the contrary, these decisions confine the point of adjudication to those cases only in which the feoffees, out of whose estate the uses were to be served, had not a legal seisin, at the time when the statute was passed. They only settled the construction of the statute to be, that the feoffees must, by entry or action, recover the estate conveyed to them, as the means of serving the uses, before the uses could execute into estate, under the statute.

There is not any resolution, nor any expression, in these cases, except in *Chudleigh's* case, as afterwards noticed, which lays a ground for the opinion, that contingent uses cannot become contingent legal interests; so as to experience the operative force of the statute, till the time shall come, or the event arrive, when these limitations are to give fixed and vested interests: or that the estate may not be executed to the use for want of a person, in whom the estate, thus executed, may vest. And, notwithstanding the language of some books to the contrary, it is clear from others, that limitations of *contingent uses*, do universally give *contingent interests*. And there is far less absurdity, and infinitely less inconvenience in the opinion, that a contingent interest may arise, at law, from a limitation of a contingent use, than that the

estate to serve that use, or a *scintilla juris* for the purpose, should remain with the feoffees. In this place, it may be observed, that the determinations which have been cited, as arising on uses or estates turned to a right, prior to the statute of 27 Hen. VIII. cannot be of any authority for uses limited since the statute; except springing uses to arise from the immediate *seisin* of the former owner, as in the case of a covenant to stand seised, or bargain and sale.

The more rational opinion seems to be, that the statute passes the estate of the feoffees in the land, to the estates and interests in the use, and apports the estate in the land to the estates and interests in the use; and modifies the estates or interests in the use accordingly. It is agreed (*g*), that an use cannot be served out of an estate, arising from an use, which is executed into estate by the statute; in other words, *an use on an use is void, as to the legal estate*; and yet an estate may arise by springing or shifting use, to the exclusion, in the whole or in part, of an estate arising from an use previously limited; and the statute will execute estates arising in this manner, without any entry by the feoffees (*h*). This instance proves, that the estate of the

(*g*) Dyer, 155; 1 And. 335; 2 And. 31; 1 Leon. 168; Bacon on Uses; 1 Eq. Abr. 383; 2 Bl. Com. 335 b; Shep. Touch. 507, in notes; Lloyd and Spillit, Barn. Ch. Rep. 384; Sanders, 133; Moor, 761; Hopkins v. Hopkins, Cas. temp. Talb. 44; 1 Atk. 589. 591.

(*h*) Moor, 632.

feoffees is confounded in the use, in whatever manner the use is limited.

In Lord Coke's report of *Chudleigh's case* (i), it is stated to have been the opinion of the major part of the judges who decided that case,—

“That the statute of 27 Hen. VIII. doth not transfer any possession to any use; only to uses *in esse*, and not to any uses in future, or contingency, till they come *in esse*.

“That there ought to be a person *in esse*, who should be seised to the use, and who should take the use; so as it behoveth, not only to have a use limited, but a person capable of the use, when the statute transferreth the possession to it: and therefore if the person fail, it is not possible to have the *possession* executed, by this statute, to one who is not in *rerum natura*.

“That no estate can, by this statute, be transferred to the possibility of an use.

“That the clause which enacts, or rather declares, that the estate, &c. which was, or rather should be, in the person seised, should thenceforth be clearly deemed and adjudged in the person having the use, doth not divest any estate out of the feoffees, but when it can be executed in the *cestui que use*.

“That if the estate should be utterly out of the feoffees, and all vested in those who have the present uses, then the future use shall never

(i) 1 Rep. 136.

arise; for that it is not possible that it should be raised out of the possession of the *cestui que use*; for an use cannot be raised out of an use.

“ That the feoffees, after the statute, have a possibility to serve the future uses, when they come *in esse*; and that, in the mean time, all the uses *in esse* shall be vested; and when the future use comes *in esse*, then the feoffees, if the possession be not disturbed by disseisin or other means, shall have sufficient estate and seisin to serve the future use when it cometh *in esse*; to be executed by force of the statute, and that seisin, and execution by force of the statute, ought to concur at the same time.

“ That if the possession be disturbed by disseisin or otherwise, the feoffees shall have power to enter, to revive the former uses, according to the trusts reposed in them; and if they, by any act, bar themselves of their entry, then this case, not being remedied by the act, doth remain as it was at the common law.

“ That although the estate of the feoffees be transferred unto the uses *in esse*, yet a possibility doth remain in the feoffees, which may be reduced to an estate, sufficient to serve the future uses.

“ That as the statute of the 27 Hen. VIII. doth extend to the uses *in esse* and persons *in esse*, and not to any uses, which depend only in possibility, for this cause contingent uses, as long as they depend in possibility, remain at

common law, and, by consequence, may be destroyed or discontinued before they come *in esse*, by all such means as uses might have been discontinued or destroyed by the common law.

“That remainders, limited in use, shall follow the rule and reason of estates executed in possession by the common law; and that a remainder in use ought to vest during the particular estate, or at least “*eo instante*,” when the particular estate endeth, as well as an estate in possession.

“That if a contingent use come *in esse*, without alienation of the estate of the land, it shall be executed by the statute of Hen. VIII.

“That if there be any alteration of the estate, before the execution, or essence of the future use, then the use shall not be transferred into possession before the impediment be removed, and the estate *recontinued*.”

The judges who composed the court in which the case of *Chudleigh* was decided, proceeded, in delivering their opinion, on the notion that the use cannot become a legal estate, unless there is a person in whom the estate, arising from the use, may vest.

This construction was made on those words of the statute, by which it is enacted, that the estates, &c. of the persons who then were, or thereafter should be, seised, should be in the *person* who then had, or thereafter should have, the use; and it was, by these judges, deemed

necessary that there should be a person to take the estate of the land, arising from an estate in the use. They admitted, that the estate of the land passes out of the trustees; and by supposing the legislature to have intended that the estate of the land should be in the person to whom the use is limited, when there shall be any such person (*k*), or there being such person, when in point of limitation, as expressed by words of contingency, he shall have the capacity of taking the estate (and this is a reasonable, and it is presumed, the proper interpretation of the statute), the law will stand precisely as it has been stated. The construction of the statute will be, that the estate is transferred to the *use*, and not to the *person*; and in support of this construction, it may be truly urged, that the word person is frequently used in statutes, to describe persons unborn, as well as persons in existence, as must be the daily experience of every one, who accustoms himself to legal disquisitions.

In exposition of that branch of the statute which gives the right, &c. of the trustees to the person to whom the use is limited, *Bacon*, in his reading on the Statute of Uses (*l*), says, "it takes more from the feoffees, than it executes presently, in cases where there are uses in contingency, which are but titles."

It is clear then, that *Bacon* is to be under-

(*k*) *Brent's case*, *Dyer*, 339 b. (*l*) *Bacon on Uses*, p. 47.

stood to have been of opinion, that the estate, though it cannot execute in the *cestui que use*, so as to become a vested interest, shall, by the operation of the statute, be drawn out of the trustees.

His remarks on the word "clearly," in this branch of the statute, more fully explain the nature and import of his observations. Turning his thoughts, as it is probable, to the arguments in *Chudleigh's* case, then recently determined, he observes, that this word "clearly," seems properly and directly to meet with the conceit of *scintilla juris*. On the application of this word, and from the preamble of the statute this profound commentator on the law of uses, concludes, that *the estate of the trustees is clearly extinct (m)*.

From these deductions and authorities (n), it appears to be the most reasonable construction of the statute of 27 Hen. VIII. that immediately after a conveyance to uses, no *scintilla juris*, or the most remote possibility of seisin, remains with the trustees to whom lands are conveyed to supply a seisin to uses, which are, or, by any possibility, may become vested, and consequently be executed into estate.

And it is observable, that in the argument of *Shelley's* case (o), one of the counsel for

(m) Bacon on Uses, 47.

(n) 1 And. 314, per *Walmsley*; Ibid. 317, per *Periam*, Ch. Bar.

(o) 1 Rep. 101; 1 Leon. 258.

the defendants—(they were *Popham*, afterwards Chief Justice of King's Bench, *Cowper*, and Lord *Coke*, all men of distinguished eminence, and unquestionably at the head of the profession)—after observing that the scope of the statute of 1 Rich. III. was to authorize *cestui que use* to enter and make a feoffment, that the feoffees often defeated the end of this statute by subtle and cunning practices; he drew the conclusion, that to take away all the power and means of deceiving by the feoffees, the statute of 27 Hen. VIII. was made; and therefore it was holden to be the *better* opinion at that time (23 Eliz.) *that for the raising of future uses* after the statute, the regress of the feoffees was not *requisite*, and that they had *not power* to bar these future *uses*; for the statute had transferred *all the estate out of them*. And, agreeable to these deductions and authorities, the construction (*p*) of the statute is, that the *whole estate* limited to the trustees to serve the uses, shall become an estate or interest in the land, subject to those qualifications and conditions, to which the estate, arising from the use, had it been originally an estate in the land, would have been subject; with this exception, however: the person who, at the common law, would have had only a *possibility* of reversion, will, by resulting use and the execution of that use into estate, have the *estate* of the reversion, and it will execute in him *quodam modo*, so as

to be vested, suspended, removed, and to attach again precisely in the same manner, and under the same qualifications as the Court of Chancery, when uses were fiduciary, decreed the property of the reversion to the person who had made the conveyance to uses, and had disposed of the fee on a contingency. This case, beyond all other cases, and especially in conjunction and with the aid of other cases, tends strongly to prove the positions which have been advanced in the interpretation of the statute of 27 Hen. VIII. It favours the opinion, that the estate in the land executes to the estate in the use; in respect of the *estate*, and not of the *person*.

This was the opinion of *Manwood*; for after stating the language of the statute in enacting, that every person that hath, or hereafter shall have, any use, &c. he concluded from these words, that the statute not only provided for those persons who were *in esse*, at the time of the act, but for all other persons who might have any of the said uses or trusts.

From the instant, then, that a conveyance is made to uses, the statute operates on the limitations of the use; and the interest and all the estate of the trustees, as far as they claim merely by the *conveyance* to serve the uses, ceases to exist; and the trustees are and will continue to be no otherwise concerned in the land, in respect of the legal estate, which was conveyed to them to serve the uses, than if no conveyance had ever been made to them;

or than if, after taking the conveyance, they had transferred the estate to persons who had the capacity of enjoying the land at present or in future (*q*). Indeed, the most correct notion which can possibly be obtained of the operation or effect of the Statute of Uses, on the subject of the execution of the seisin or estate to the use, and particularly with a view to this much controverted point, may be formed, by supposing a conveyance to uses, and that the feoffees to uses make a conveyance to those persons to whom, on the conveyance to the feoffees, the use is limited, whether those persons be *in esse* or *in posse*; and to whom it would result according to the rules of courts of equity, in those instances in which there was not any present or effectual disposition of the use of the fee.

The fourth section of this statute is applicable to rents, and has prescribed this very construction, and materially strengthens the argument.

The language of the statute is, "And whereas also divers persons stand and be seised of and in any lands, tenements or hereditaments in fee-simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of X li. or more or less, out of the same lands and tenements; and some

(*q*) Bacon on Uses, 45.

other person one other annual rent to him and his assigns, for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared limited and made thereof;

“ Be it therefore enacted, by the authority aforesaid, that in every such case the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest, or use of the said rent or profit, *and as if a sufficient grant or other lawful conveyance had been made and executed to them,* by such as were or shall be seised to the use or intent of any such rent to be had, made or paid according to the very trust and intent thereof; and that all and every such person and persons as have or hereafter shall have any title, use and interest in or to any such rent or profit, shall lawfully distrain for nonpayment of the said rent, and in their own names make avowries, or by their bailiffs or servants make cognizances and justifications, and have all other suits, entries and remedies for such rents, as if the same rents had *been actually and really granted to them,* with sufficient clauses of distress, re-entry or otherwise, according to such

conditions, pains or other things limited and appointed upon the trust and intent, for payment or surety of such rent."

Between a conveyance from the feoffees to the *cestuis que use* and the execution of the use into estate by virtue of the statute for transferring uses into possession (*r*), various differences exist.

They arise out of the spirit, and are enforced and enjoined by the language of the statute. One of the differences is,

1st, The possibility of reversion, if there be any, will be in the person who makes the conveyance originally to uses, instead of the feoffees in whom it would remain on a reconveyance.

2dly, The interest, which under the operation of the statute, is an estate when the use of the fee is limited in contingency, would, under a conveyance of the legal estate, be merely a possibility.

Thus, when lands are limited by a conveyance at *common law*, to *A* for life, remainder to the heirs of *B*, who is living, the fee will pass out of the person who makes the conveyance.

No estate will remain in him. He will retain the mere possibility of having the fee as a vested interest, when it shall be certain that the fee cannot vest in the person to whom the same is limited.

Mr. *Fearne* has doubted on this point, or

(*r*) 27 Hen. VIII. c. 10.

rather arrived at a different conclusion. The weight of authority, and, it seems, the principles of tenure are against his reasoning. He judged of the law as it might with propriety have been, instead of pursuing it as part of a system(s).

Suppose *B* to survive the continuance of the estate of *A*, then the possibility of having the land by reversion, will become an estate by reason of the reversion; and suppose *B* to die during the existence of the estate of *A*, and while the contingent remainder is capable of effect, then the possibility will not exist any longer.

Again, suppose a conveyance to be made to *A*, in fee, to the use of *A* or *B*, for life, remainder to the heirs of *C*, who is living.

In this instance, immediately after the execution of the conveyance, *A* or *B* will have an estate for life, and the heirs of *C* will have the fee, provided *C* should die during the continuance of the estate of *A* or of *B*, being the tenant for life. In the mean time, till the remainder limited to the heirs shall vest in interest, the fee will, by resulting use, execute in the person who makes the conveyance to uses, so as to become an absolute estate in him, if the contingent fee should fail of effect; and to be defeated, if the limitation to the heirs of *C* should give a vested interest; and as well, in the mean time, till the interest conveyed by the gift to the

(s) 3 Abstr. 253.

heirs shall vest in estate, as after that limitation shall fail of effect, the person who makes the conveyance to uses, hath an estate in fee, of which he may dispose at his pleasure; and be even instrumental in barring the contingent remainder by uniting his reversion to the particular estate by which the remainder is supported, and defeating the remainder by taking from it, through the learning of merger, the support of the particular estate on which it depends for effect (*t*).

Also, he may induce the like consequences, by accepting a surrender of all those particular estates which are the support of the remainder.

Nemo est hæres viventis (*tt*). For this reason the limitation to the heirs passes a remainder in contingency, for want of a person in whom the interest may vest.

Till the death of the ancestor, it is uncertain who will be his heir; on that account, no one can take by the name of heir, generally, till the death of the person to whom this term of relation is applied.

The like observation applies to a remainder to heirs of the body, used in the proper and technical sense of these terms.

These observations are equally relevant, when the remainder is contingent, by reason of the form of the limitation, as containing words of contingency.

(*t*) 3 Convey. 488.

(*tt*) 1 Inst. 22 b.

Conveyances are frequently made to and to the use of a man and his heirs (*u*).

Under a conveyance in these terms, the person to whom the use is limited, is not seised by force of the Statute of Uses, but by force of the ordinary operation of the conveyance, and the rules of the common law, independently of the Statute of Uses.

That the title to the estate may depend on the operation and effect of the Statute of Uses, the conveyance must be to one person and the use limited to another person; or the grantee must be one only of several persons to take under the declaration of uses, as one of two joint-tenants (*x*); or if the use be expressed in favour of the person to whom the conveyance is made, there must be some purpose to be answered, through the medium of that conveyance, which cannot be attained under the rules of the common law; as the power of making leases, shifting the use, &c. vesting the estate agreeable to the intention of the parties, &c. (*y*).

Hence the determination in the recent case of *Goodill v. Brigham* (*z*), as commented on in 3 Vol. Convey. (pp. 165, 494) and hence the

(*u*) Dyer, 186; Bacon on Uses, 63; Com. Rep. 313; Skin. 209; Gilb. Rep. 17; Butler on 1 Inst. 271 b.

(*x*) Bacon on Uses, 64; Dyer, 111.

(*y*) Bacon on Uses, 63; Hutt. 112; *Carwardine and Carwardine*, Butler's Fearn, 388; *Samme's case*, 13 Rep. 54; Ley. 11.

(*z*) 1 Bos. & Pull. 192.

observations on the form of uses for preventing the attachment of a title of dower (*a*).

If the conveyance be to and to the use of *A*, in fee, with ulterior uses declared of his estate, these ulterior uses will be considered as uses on uses, and they will be repugnant to the use declared to *A* himself. For that reason the ulterior uses are not of any avail, at law. They are merely equitable interests; effectual in equity, though denied by the courts of law to be of any validity in reference to the legal title (*b*).

Again, on a conveyance to a man (*c*) in fee, there is a difference when a particular estate is limited to his use, and when an estate in fee.

In those instances in which he has a *particular* estate, he will hold that estate by force of the Statute of Uses; because he cannot have the particular estate out of an estate in fee, otherwise than by means of this statute.

So if the grantor took a life estate or in tail, he would be seised by force of the statute.

In those instances in which the grantee has the *general estate*, that is, the *estate in fee*, his title will depend merely on the common law; because he may have that estate consistently with the estate he took by the conveyance. The limitation of the use for a particular estate, affects

(*a*) Watk. Principles, 2d edit. p. 49.

(*b*) *Whetstone v. Bury*, 2 P. Wms. 146; Prec. in Chan. 591; 3 Atk. 729.

(*c*) Bacon on Uses, 63, 64. Bacon is very confused and indistinct on this point.

only part of the time taken by the conveyance, and not the whole of that time ; and it leaves in him the residue of the ownership, under the common law conveyance (*d*).

And when a conveyance is made to *A*, to such uses as *A* shall appoint, and in default of appointment to the use of *A* in fee, the uses will be void; and *A* will be seised by the rules of the common law, on the ground, that he is the only person for whose benefit an use was declared, and there is not any person who could have called on him for the execution of the use into estate. The estate is already in him, and the equitable ownership is blended in the legal ownership.

So when the interest limited to the feoffees is contingent, the interest of the *cestui que use* must partake of that quality ; or, more properly speaking, there cannot be any estate in the use till the estate of the feoffees shall be *vested*. If, under these circumstances, there should be a discontinuance or disseisin, it is admitted that the feoffees must enter to restore the seisin, before the use could execute into estate.

These observations will illustrate the distinction already taken on the *scintilla juris* of the feoffees.

When, on a conveyance to a man, there is also a limitation of use in his favour; as to *A*, to the use of him and his heirs, or to *A* and his

(*d*) *Piers and Hoe's case*, 1 Léon. 125; *Dier*, 186; 2 And. 180; and *Crawley's case*, Ib. 130.

heirs, to the use of him and his heirs for lives (e); the several limitations of the estate and the use are construed as several parts of the same gift, and are to be considered, collectively, as marking the continuance of the estate. In this instance, the clause declaring the use may enlarge or explain the limitation to the grantee; or rather forms part of that limitation.

In those instances (f) in which the conveyance of the land and the limitation of the use are to distinct persons, the rule of law is, that the limitation of use cannot enlarge the estate of the land.

In other words, when a man takes by the statute, under a conveyance to uses, the estate in the use cannot be larger than the estate granted in the land to serve the use. The estate in the use and the estate in the land pass by limitations which, in consideration of law, are distinct. In cases with these circumstances, the estates in the use are like derivative interests out of the estate in the land limited to supply the estates in the use.

Of consequence, the estate in the use cannot be larger than the estate limited in the land to serve the use. At the utmost, it can only be commensurate with the estate in the land, however small the estate in the land may be when compared with the quantity of interest, which

(e) *Jenkins and Young*, Cro. Car. 167.

(f) *Crawley's case*, Cro. Eliz. 721; *Owen*, 126; 2 And. 130. S. C.; *Shep. Touch.* 516.

the words, in the clause of limitation of use, are sufficient to pass.

The distinctions briefly stated, are,

1st. A limitation to pass an estate by force of the Statute of Uses, cannot give a more ample interest than is conveyed to and actually vests in the feoffees to serve the use.

2dly, When, on the conveyance of the land, no time of continuance is limited by express words, and the land and the use are limited to the same person, the declaration of use will form part of the limitation of estate.

Estates are said to arise

By resulting use (*g*), when an assurance is to have its operation solely under the Statute of Uses; or through the medium of a conveyance at common law, to supply a seisin to the uses; and no disposition is made of the use for some part of the time of the estate of the person who limits the use.

In this case, the use is said to result to the former owner of the estate; and the use will execute in him, exactly in the same manner as if the use had been limited to him expressly for that time; and he will be seised by means of the Statute of Uses, and not by virtue of his old seisin or ownership. This point affords ample scope for illustration by differences and distinctions.

In this place it will be sufficient to observe, that a resulting use is that part of the owner-

(*g*) 1 Lord Raym. 33; Com. Dig. Uses, D. 1.

ship of which no disposition is made, and which remains with the author of the uses (*h*).

The contingency, when it arises, draws the estate to the *use*, and defeats, in the whole or in part, the use which resulted to the grantor.

Uses can result or be implied only, 1st, where there is a chasm in the disposition of the ownership, and it cannot be filled by any other means than by giving to the person who is the author of the uses, an estate for that precise period of time of which no disposition is made. This can happen in those cases only in which there is a limitation to the heirs of the author of the uses, or to some other person *after his decease*; and then only when no estate is limited to him or to any other person, for the exact *period* of his own *life*, and he himself (*hh*) does not take any estate by *express limitation*, which excludes the implication, and negatives the construction of an intention to take an estate for that period; or,

2ndly, Where there is not any limitation of the use of the fee; or, where the fee is limited in contingency. In the first case, the use of the fee will result absolutely; and in the second case, only till the contingency arises. But it never will result, if it would be contrary to some estate expressly limited (*hh*).

The doctrine of uses, is a subject of great importance to the profession; and on that account, the Author has been more diffuse on this head, than may be deemed necessary.

(*h*) 1 Inst. 22 b.

(*hh*) Dyer, 111 b.

Possibly, he may be mistaken in his construction of the statute on the disputable points; and the readers of this book will act prudently to suspend their opinions on the doctrine of *scintilla juris*, the principal point of discussion, till it shall be decided by the solemn judgment of a court of justice. He is not aware there ever has been a decision directly on the point. All the opinions which have been delivered from the bench, on this head, have been extra-judicial. If any argument is to be drawn from the decisions themselves, without any reference to the opinions expressed on pronouncing these decisions, or if practice is to be the guide, they seem to support the Author's conclusion.

Limitations of trust do not give any estate at law. They merely entitle the person, beneficially interested, to an estate in equity. Trusts, simply, by way of beneficial without any legal ownership, are, at this day, the same as uses were before the statute of 27 Hen. VIII. The word *use*, and the word *trust*, in their most extensive signification (*i*), were, in those days, convertible terms; although, in some instances, they were used with different meanings; the former, to express the beneficial interest in the land, by having the *use* and *enjoyment* of the land itself; the other, to express some benefit independent of the use of the land, as a sum of money to be raised, &c. the right of having the

(i) 2 Eun. 103.

benefit of the money, arising from the land after that money was received. Every trust was not, in the terms of this distinction, an *use*, although every use was a trust. This very distinction has been regarded in the application of the law to cases arising on the Statute of Uses; and therefore

1st, If an estate be conveyed to a person, to the intent that a common recovery may be suffered; or,

2dly, That the rents may be received by the feoffee, and applied in a particular manner; or,

3dly, That the feoffee may do some act with the rent of these lands, as pay taxes, repair the premises, &c.; or convey, &c.; these trusts are not executed by the Statute of Uses; though they are declared beneficially for another person; for in all these cases the estate of the land must remain in the feoffee, to enable him to perform the trusts.

A trust, with reference to the use of the estate, may be described to be a right in equity to have a conveyance of the land, and to take the profits in the mean time.

“The Statute of Uses transferred entirely all that was equitable” (in point of estate must be understood) “into a legal modification; and the courts of law were then bound to ask what was the equity, because the statute said that the law should follow equity (*j*):” while mere trusts are to be executed by a conveyance, and the

(j) Per Lord Mansfield, Cowp. 266.

parties have a right to apply to a court of equity for that conveyance (*k*).

Trusts are divided into

1. Trusts executory,
2. Trusts executed.

These are terms of relation, and to the person rather than to the interest. Every trust is executory (*l*), in relation to the person who is to perform the trust. On the other hand, every trust may be said to be executed, with reference to the person in whose favour it is made, and his power of alienation, by reason of his interest, under the trust.

As often as mention is made of trusts, with a view to the conduct of the trustees and the nature of the trusts, the trusts are said to be executory (*m*); and when with relation to the person who is to have the benefit of the trust, and his interest by reason of the same, they are said to be executed.

This distinction, it is submitted, accounts for the difference of expressions which frequently occur on this subject.

The expression, trusts executed, is used in some instances, indeed more generally, in another sense, different from that already noticed. Thus uses giving the legal estate, by the operation of the Statute of Uses, are frequently distinguished by the appellation of *trusts executed*, to distinguish them from those trusts

(*k*) 3 Burr. 1108. (*l*) 1 Tr. Atk. 594.
 (*m*) *Roberts and Dixwell*, 1 Atk. 607.

which remain equitable interests, and on which the statute does not operate.

In point of fact and of law, the former species of trust are *uses*, and are denominated trusts, only from the terms in which this mode of ownership was, prior to the statute, expressed.

There is also another and different sense in which the expressions, trusts executed and executory, are applied.

Thus a trust is executory, whether arising under a conveyance by deed or will, or under an agreement to convey; or in marriage articles, when the trust is by express direction, or by inference, from the nature of the instrument, (and this is peculiarly the case in marriage articles) to be perfected by a conveyance or settlement at some future period.

Under these circumstances, the trusts are to be carried into execution, agreeable to the intention; as that intention can be collected either from the genuine sense of the words, or discovered from the nature of the instrument, without regard to the strict legal import of the words, or their technical sense; or from the nature of the contract and the objects of the provision; as children claiming under marriage articles. For by the direction, or, which is of the same effect, the necessary inference, that a conveyance is to be made, it is evident that something further is to be done; and it devolves, as a consequence, to the courts of equity, to order in what manner and with what limitations the conveyance shall be made: and that court, on the rules of esta-

blished practice, will order the conveyance to be made in such manner, and with such limitations, as will best answer the intention of the author of the trust. Under this discretionary power, courts of equity will construe the language in conformity with general practice, so as to give estates to sons in succession; to supply cross remainders; and add limitations to trustees for preserving contingent remainders, &c. &c.

Of trusts of this description, and the construction applied to them by the Court of Chancery, a more extended view will be taken in the chapter on Freeholds, and in considering the extent of the rule in *Shelley's* case, and the exceptions to that rule (*n*).

Trusts executed are, when by *deed* or will lands are conveyed or devised, in terms or in effect, to and to the use of one person, or several persons, in trust for others, without any directions that the trustees shall make any farther conveyance; so that there is not any ground from which it appears that the author of the trust had a view to a future instrument for accomplishing his intention.

Dispositions in this form are not objects on which the Court of Chancery can assume a directory or discretionary power. The rule applicable to such trusts is, that equity follows the law, and limitations of equitable interests and legal estates receive the like construction.

Thus, in the language of *Lord Alvanley* (*o*), "This court [Chancery,] has determined, that

(*n*) Ch. 3.

(*o*) *Philips v. Brydges*, 2 Ves. jun. 127.

such equitable estates are to be held perfectly distinct and separate from the legal estate. They are to be enjoyed in the same condition, entitled to all the same benefits of ownership, disposable, devisable, and barrable, exactly as if they were estates executed in the party; and the persons having them may, without the intervention of the trustees, or the possibility of their preventing them from exercising their ownership, act as if no trustees existed; and this court will give validity to their acts; and when I am told that legal and equitable estates cannot subsist in the same person, it must be understood always with this restriction, that it is the same estate in equity and at law." (oo)

In the application of the law to trusts executory, the construction is different; for, since the author of the trusts declares it to be his intention that something farther shall be done, and makes provision for this object, the Court of Chancery, which hath a peculiar jurisdiction over interests of this sort, and a controlling power over the conduct of the trustees, will carry into execution the intention of the author of the trust, as far as that intention can be collected, and can be complied with consistently with the rules of law.

Of trusts, being uses which are executed by the statute of 27 Hen. VIII. and of trusts executed, which are not uses, and give merely an equitable ownership; and of trusts which are

(oo) *Robinson v. Cuming*, Cas. temp. Talb. 164.

merely executory, the following are apposite examples, showing the material distinction between them.

1st, A conveyance or devise to *A* and his heirs, in trust for *B* and his heirs, gives a *trust*, i. e. an use, *executed under the Statute of Uses*; and the trust becomes a legal estate in *B*, through the medium of that statute.

2dly, A conveyance or devise to and to the use of *A* and his heirs, in trust for *B* and his heirs, gives a *trust executed*, but does not pass the legal estate: the second use is an *use on an use*, and therefore a mere trust, or use in the second degree, conferring an equitable ownership.

3dly, A conveyance or devise to *A* and his heirs; or to and to the use of *A* and his heirs, upon trust to convey to *B* and his heirs, is a trust merely executory.

An estate *by implication of law* has place, only in limitations of use, either by assurances operating merely by the statute, or through the medium of a conveyance to serve the uses; and in devises by wills.

By the rules of the common law applicable to deeds (*p*), no intention will be presumed unless it be expressed; and consequently, no estate will arise unless there be a limitation to pass that estate.

(*p*) Vaugh. 260; 1 Bq. Abr. 196; 2 Lev. 79, per *Twissden*, cites 13 Hen. VII.; 2 Lord Raym. 1152; Perk. § 173; and *infra*, an exception. The same point applies to copyholds, Lex. Cust.; Tr. on Eq. 59, § 2.

In devises by wills, and in some cases in limitations of the use, a different construction is made (*pp*). From an intention expressed in reference to one person, the courts of justice will, in these cases, imply an intention in favour of another person (*q*).

In these instances, however, the implication must be necessary; such, that without it, the intention of the parties cannot have effect, according to the terms in which they have expressed themselves. But no estate can arise by implication to defeat an estate which is expressly limited.

When a conveyance is made by a man to the use of his heirs (*pp*), and no estate is limited to himself, or to any other person for his life, and he does not take any estate by express limitation to be excluded, or which would be merged by means of the estate to be implied, then an estate will arise by implication, for he cannot have any heirs till his death; consequently there is a portion of time commensurate with his life, and which, independently of the time of any other estate, will elapse before the limitation to his heirs can take place: also in reference to any other estate previously limited, and liable to determine in his life-time, so that an interval

(*pp*) 1 Inst. 32 b; *Pybis and Mitford*, 1 Vent. 372; *Ellen and Coxen*, 1 Lord Raym. 33; 4 Mod. 380; 1 Lev. 75; *Fearne* 54; *Wallis and others v. Palmer*, 5 Burr. 2615; 2 Black. Rep. 687; 2 Wils. 22.

(*q*) *Romilly v. James*, 6 Taunt. 263; *infra*, *Ch. Estates-Tail and for Life*.

may happen between the determination of that estate and his death; an estate for life will arise to him by implication. And as Mr. *Fearne* (1), with his wonted accuracy and force of reasoning, has observed, the inference afforded by the several cases seems to be, that when the use is not limited away *during the whole life of the grantor*, [it would be more clear, perhaps, to say, for the express and exact period of the life of the grantor], and there is a use limited which cannot commence till after his decease (as is the case of a limitation to the heirs of his body taken by itself), whether that use be limited in the first instance (as in *Pybus v. Mitford*), or be preceded by limitations for terms for years (as in *Penhay v. Hurrell*), or by uses of the freehold and inheritance, that may determine in the grantor's life-time (as in *Wills v. Palmer*), the use results to the grantor for life; *immediately*, in the first case, and *in remainder* expectant on the preceding uses in the other, where there is no express use limited to the grantor himself, inconsistent with such an implication, the law will imply an intention in the author of the uses to retain the use to himself for his life.

These positions flow from the rule (3), that so much of the use of an estate as is not limited away, remains in the person out of whose estate these uses are created; and the rule applies to

(1) P. 48.

(2) 1 Inst. 22 b; *Fenwick v. Mitford*, 1 Leon. 182.

those instances only in which the measure of the time in the use would not be completely and fully disposed of, unless an estate for life was held to result to or abide in the person by whom the uses *are limited*, as the author of them. To call the rule into operation and effect, there must be an interval, and a manifest *vacancy* of ownership; and the time of that vacancy must, in deeds and wills, be commensurate with the life of the person from whom, as their author, the uses flow; or in wills, *commensurate* with the ownership under an estate-tail; because, under any other circumstances than those which leave a vacancy for his life, or in wills equal to the measure of an estate-tail; the courts have thought there was not any reason to imply an intention to retain the use for the intermediate time.

The law, as now settled, implies an estate for life by resulting use, as well when the limitation to the use of the heirs is by way of remainder, after limitations of use to commence, and which may determine in the life-time of the author of these uses, as when no disposition of the use is previously made for any estate of freehold. In *Pybus* and *Mitford* (*t*), the limitation to the use of *the heirs* of the body was not preceded by any limitation of an estate of freehold; and in *Willis* and *Palmer* (*tt*), there was a limitation of the use for several estates for life, and in tail, prior to the limitation to the use of

(*t*) Vent. 372.

(*tt*) 5 Burr. 2615.

the *heirs* of the body of the person out of whose estate the uses arose, but there was not any estate for the exact period of the life of that person; and in both these instances, it was held, that an estate for life resulted to the former owner of the property, so as to give him an estate of freehold for his life, which, under the rule in *Shelley's* case, attracted to it the benefit of the limitation to the use of the heirs of his body, and vested the entail in him, so as to make it descendible from him to his issue, and to be claimed in succession from him; and not in the issue originally in their own right as purchasers under the names of heirs of his body.

When an estate for the life of the author of the uses is limited to another person (*u*), the reason for raising an estate for life by implication cannot exist, though there be afterwards, in the same instrument, a limitation to the use of his heirs of his body. The reason is obvious: an use is declared of all the time or ownership of the estate which is conveyed; and therefore no room is left for any implication; and the consequence is, that these heirs will take an estate by *purchase* in their own right, without deriving that estate from or through their ancestor. They take, merely because they fall under the given description, and because the name or character by which they are described, is fulfilled in their persons as heirs of the body.

(*u*) *Tippen v. Corin*, 4 M&D. 380.

An estate cannot be raised or implied by resulting use, to any person, except the owner of the estate out of which the uses are raised (*uu*); nor can it be raised or implied in favour of that person when he has an estate by express limitation, inconsistent with an estate to be raised by implication.

An express estate to the author of the uses, limiting to him an interest of a chattel quality, excludes the inference and presumption in his favour, under which he would be held to take an estate of freehold. Thus (*x*), *Savage*, by lease and release, made a conveyance in fee to the use of *himself* for ninety-nine years, if he should so long live, remainder to trustees for twenty-five years, remainder to the heirs male of the body of *Savage*, remainder to his own right heirs; and it was held, that no use could result contrary to the express limitations of the party; and that *Savage*, being tenant for years by express limitation, could not be tenant for life by implication; and that the limitation to the heirs males of his body was void (*y*), for want of a preceding estate of freehold to support the interest limited to the heirs.

On this decision it may be observed, that if any case would allow of a construction in favour of the author of the uses, to give him an estate

(*uu*) *Davies and Speed*, 2 Salk. 675.

(*x*) *Adams v. Savage*, 2 Lord Raym. 854; 2 Salk. 679.

(*y*) Now good, as capable of effect by springing use.

of freehold, by implication, at the same time that he took an estate of a chattel quality by express limitation, this was a fair instance for its application; for the estate of freehold would not have been immediately expectant on the estate for years determinable on his decease, so as to have caused its immediate merger, but would have taken place in order of time, after and in remainder of the estate for twenty-five years, limited to the trustees. Thus, the two estates would, in the first instance, have been distinct and compatible.

Notwithstanding this circumstance, the resulting use was negatived in this case, and also in *Rawley and Holland* (2); a case which was open to the like observations, as containing similar limitations; with the difference only, that in *Rawley and Holland*, the trustees had a longer term, viz. two hundred years.

In *Rawley v. Holland*, the express ground of the decision was, that no estate of freehold could result to A for his life by implication, because another estate, viz. for ninety-nine years, if &c. inconsistent with a freehold by implication, was expressly limited to him.

But when the estate for years is limited to some other person than the author of the uses, in trust for him, then an estate of freehold may arise to him by implication. *Beverley* and

(2) 22 Vin. 189; 2 Eq. Abr. 753.

Beverley (a), is an authority for this distinction.

In that case, a conveyance was made by *A*, to the use of trustees for seventy years, if *A* should so long live, remainder to trustees for three thousand years; and from and after the death of *A*, to *B*, his son, for life, with divers remainders over.

It was objected, that the limitation to *B*, and the remainders over, were void; being estates of freehold to commence *in futuro*. The ground was, that the first freehold estate was limited to *B*, and was not to arise until the death of *A*; and no estate was vested in *A* for his life, unless an estate for life resulted to him. And after solemn argument on the point, and a case stated to the judges for their opinion, it was decreed, that an estate for life resulted to *A*, and supported the limitation over.

And in *Willis and Palmer* (b), the author of the uses had the fee under the limitations of use, till the marriage then in contemplation, and for which the settlement then made was intended to be a provision; and still an estate for his life was held to result to him, under the uses, to take place after the marriage (c).

Again, when a man *devises* lands of inheritance after the death of his wife to the person who is his heir (d), then from the expression of

(a) 2 Vern. 131.

(b) 5 Burr. 2615; 2 Bl. Rep. 617.

(c) Fearn 63; *Davis and Speed*, 2 Salk. 675.

(d) 1 Eq. Abr. 196.

the particular period at which the heir is to take, the law considers him to be excluded of all right of enjoyment till that time; and because the death of the wife is used to mark the commencement of the estate limited to the heir, the law presumes that it was the intention of the testator, that his wife should have the property devised in this manner for life. Hence, by implication, the widow will be tenant for life.

So if a man devise land to another after default of issue of the body of the person, who, on his death, will be his heir (*e*), the implication is, that the testator intended that his heir should have an estate-tail, and the devisee an estate in remainder, expectant on that estate; and estates will pass to the heir at law and devisee accordingly. The intention of the testator cannot be reconciled with his words; or his will, as expressed, have effect by any other construction.

The devise considered as a substantive independent gift would be construed a devise to take effect on an indefinite failure of issue; and in that point of view would be void, as too remote (*f*).

Again, when a devise is made to two persons who may not lawfully intermarry, and the heirs of their bodies; and in case they shall both die without issue of their bodies, then to another,

(*e*) *Waller v. Drew*, 1 Com. Rep. 372.

(*f*) *Lady Lanesborough v. Fox*, Cas. temp. Talb. 262.

each person has, under this devise, an estate-tail, with a remainder in the other's moiety in tail; in other words, with a cross remainder in tail. The express limitation passes several inheritances with a joint freehold. Each tenant has an estate to himself (jointly with the other during the life of that person, and till the jointure shall be severed,) and to his heirs of his body; and under that limitation, the estate of each person, so far as it is merely an estate of inheritance, would determine when there shall be a failure of heirs of his body.

The clause introducing the next limitation imports an intention which would not be completely fulfilled by this construction. From the terms in which the remainder is introduced, it is clear, the person to be benefited by that limitation is not to be entitled to the possession till there shall be a failure of the several heirs of the several and respective bodies of each of the devisees. Therefore it is concluded, that an interest of that extent was intended for them; and since no construction which can be made of these clauses of express limitation would give to each an estate-tail in both moieties, the courts will raise an estate-tail to each, in the moiety of the other, by implication (*ff*).

All these cases are to be contrasted with instances in which there is not any room for such implication; and in the chapters on

(*ff*) See also *Tenny v. Agar*, 12 East, 253; *Romilly v. James*, 6 Taunt. 263.

Estates-tail, and for Life, the discussion will be resumed.

Estates will now be considered in relation to their *quantities* and several sorts, as they are of freehold, and not of freehold; and with reference to the words by which their extent is to be marked, or may be ascertained; and also with a view to the construction of instruments already prepared, and under consideration for an opinion on their legal operation and effect.

CHAP. II.

On Freeholds.

THE term freehold, as denoting an estate of a given *quantity*, or rather of a peculiar *quality*, is opposed to the term chattel (*g*).

Questions have arisen on the import of this term. Reference has been made to the most ancient law writers, to prove the grounds of a variety of opinions. The passages which have been quoted have been sometimes misunderstood, or grossly misrepresented.

The term may be easily explained.

It is acknowledged, on all hands, that our rules of property are, for the most part, derived from the policy of the feudal establishment (*h*).

(*g*) 1 Inst. 43 b; 1 Burr. 108.

(*h*) 2 Eun. 85; 2 Bl. Com. 44; 3 Bl. Com. 434; 1 Doug. Contr. Elect. Cases, 2.

And even *Lord Coke*, contrary to the general opinion, was aware of the laws of feuds, and their applicability to some portions at least of our system: thus (*i*), he cites from *Bracton* (*k*), this passage, "*Fuerunt in conquestu, liberi homines qui libere tenuerunt tenementa sua per libera servitia vel per liberas consuetudines et cum per potentiores ejecti essent, postmodum reversi receperunt eadem tenementa sua tenenda in villeinago; faciendo inde opera servilia sed certa et nominata, &c. et nihilo minus libera quia licet faciunt opera servilia cum non faciunt ea ratione personarum sed ratione tenementorum.*"

Under the feudal system, real property was held either by farmers at the will of their lords, or by other persons for stated periods, as during their lives, or some other space of time measured by an event which might not happen within the period of a life (*l*).

At this period of our juridical history, estates for years were unknown, or were so rare, and limited for so short a time, that, in point of interest and value, and from the low estimation in which the owners of these interests were held, they were of little or no consideration.

By the ancient law of England, for many respects, a man could not have made a lease above forty years at the most; for then was it said, that by long leases many were prejudiced,

(*i*) 1 Inst. 116 b.

(*k*) Lib. 4, 1 fol. 7.

(*l*) Sullivan's Lectures, 50; 1 Inst. 45 b; 2 Eun. 102; 2 Bl. Com. 55; Simeon on Elections, 66; Butler on 1 Inst. 290 b; Dalrymple on Feuds, 25.

and many times men disherited; but that ancient law is antiquated (*m*). This is the language of Lord Coke.

But the law against leases for more than forty years, if it ever existed, was soon antiquated; and several instances of leases for a longer term, as early as the reign of Richard II. are referred to in *Mad. Form. Angl.* (*n*).

That long leases were deemed injurious, arose from the temper of the times; they gave a consequence and a power to the cultivator of the soil, which was looked at with jealousy by those whose profession was arms.

According to Lord Chief J. *Holt* (*o*), "the reason why a term for years was esteemed in law to be a less estate than a freehold for life is this: in former days, all actions for titles to land were real; and lands being leased for long terms, and fines taken for such leases, it was usual for the lessors, or their heirs, to suffer common recoveries, and by that means the lessees were evicted, because they could not falsify those recoveries until they were enabled so to do by the statute 21 Hen. VIII. c. 15, by which it was enacted, "that a termor might "falsify such recovery, as any tenant of the "freehold might do by the course of common "law, where he was neither privy or party to "the same; and that notwithstanding any such "recovery, he should hold and enjoy his term, "according to his lease, against the recoverer,

(*m*) 1 Inst. 45 b.

(*o*) 9 Mod. 102.

(*n*) 2 Bl. Com. 145.

"his heirs and assigns." It is true, in those days the terms for years were usually granted for a short time ; for nobody would take long terms, because the tenant of the freehold could destroy them, *ad libitum*, by suffering a common recovery as aforesaid ; therefore, those estates for years were accounted the least, and next to estates at will. But when the statute gave the termor a remedy to falsify a common recovery in defence of his term, then those estates for years became more permanent, and for that reason the lessees took long terms."

From the division of estates it will appear that such interests only as may continue for the period of a life are estates of freehold.

All interests for a shorter period, or more properly speaking, for a definite space of time, measured by years, months, or days, are deemed chattel interests ; in other words, testamentary, and of the nature, for the purposes of succession, of other chattels or personal property.

These interests of a chattel quality, when they first came into use, were of short duration (*p*). They were generally confined to a few years ; and even while the years were continuing, were in the power of the owner of the freehold, and probably at the first introduction of the feudal polity, (especially while the doctrine of that system of tenures was strictly observed

(*p*) Butler on 1 Inst. 290 b ; Dalrymple on Feuds, 22 ; Bac. Abr. tit. Leases ; 1 Inst. 75 ; Sullivan 57 ; 2 Eun. 102 ; 1 Reeve's History of the Law, 6. 39.

and adhered to with rigour,) might have determined the tenancy *at his pleasure*, by his entry, or the declaration of his will (*q*). Till the twenty-first year of the reign of Hen. VIII. the freeholder might certainly have put an end to the estate of his tenant for years, by suffering the land to be recovered out of his hands. That statute gave to the tenants of leasehold or chattel interests, the right of avoiding a recovery suffered by covin or default. Prior to this statute, indeed, it had been held that a lessee, when ejected by his lord, (the lessor) or his heir, might recover the possession in his own name.

For the law of Scotland, see Erskine's Prin. 2 lib. p. 172.

Leasehold interests, or, as they are called in that country, tacks, received the sanction and confirmation of parliament, to insure their permanency against successive owners of the feud, in 1449.

The persons to whom these chattel interests were granted, were generally of low degree, and very likely the *villeins* of ancient times, who are the *copyholders* of the present day (*r*); and the estate of copyholders was originally, and in truth, at will only (*s*).

(*q*) 9 Rep. 135; Farresley, 42; Butler's Co. Litt. 290 b; 1 P. W. 524; 1 Inst. 46 a; Plow. 83.

(*r*) F. N. B. 12 c; 1 Inst. 58 a. 117 b; 2 Brownl. 77. per *Dodderidge*; Dalrymple on Feuds, 25; 1 Reeves, 6. 32. 39. 98; *Holder v. Preston*, 2 Wils. 400.

(*s*) 9 Rep. 76; 2 Leon. 15.

A soldier (and of this profession were all persons of rank or of considerable property) deemed himself degraded, in this warlike age, by employment in husbandry. To employments in husbandry, and to the persons who exercised those employments, terms of inferiority, degradation or disrespect were attached.

Little, if any, regard (*t*) was paid to the quantity of the interest of these farmers. They did not derive importance from their tenancy. It did not entitle them to be members of the great council (the parliament of modern times,) or judges, or suitors in the courts of justice.

And when the title of their lord, the person of whom they held, was questioned in a real action, though of consequence, their right under him was involved in that question; they, by the common law, had not any means of defending the title, even for their own interest. The right of defence devolved on the lord alone (*u*). Unless he took it on himself, his tenant was without remedy (*x*). In truth, these tenants were the servants of the lord, rather than owners in their own right (*y*). Their interest is accurately described by *Fleta*. They held the tenements in their occupation, *in the name of their lords*, and not of themselves.

The lands occupied, were considered as the

(*t*) 2 Eun. 102; Dalrymple, 25; 1 P. W. 574.

(*u*) 1 Inst. 46 a.

(*x*) *Fleta*, lib. 5. c. 5. § 20.

(*y*) 1 Inst. 116 b.

lords demesnes, and copyholds are, even at this day, *parcel* of the demesnes of the manor.

This description of the interest of termors for years, corresponds with the accounts given of them by *Bracton*, in distinguishing freehold interests from other interests of an inferior nature. And hence that useful and important principle of our law, that the possession of the tenant is the possession of the reversioner (*x*); in other terms, the continuance of possession in the tenant, is continuance of seisin for the person to whom he is tenant. Hence, also, in former times, the anxiety to change the tenancy by *attornment*, without changing the *person* of the *tenant*; a practice now, in a great measure, of no avail, since the statute law has rendered attornments void (*a*).

The situation of an owner (*b*) of an estate of that quality, which at this day is denominated a freehold interest, was very different from the condition of the copyholder, the villein, or the farmer. A freehold interest conferred on its owner a variety of rights, and some of the most valuable privileges.

As soon as he obtained his estate, he became a suitor of the courts, and a judge in the capacity of a juror (*c*). And this is that species of estate which, by the common law, entitled a man to be summoned on juries (*d*), and to give his voice in the election of members to serve in

(*x*) 1 Inst. 319 a. 324 b. (*a*) 4 & 5 Anne. (*b*) 1 Reeves, 6.

(*c*) 2 Bl. Com. 54; Sull. 58.

(*d*) 1 Inst. 156 b.

parliament for counties ; and also for those boroughs in which the right of voting is in owners of tenements within the borough generally, or of tenements of a particular description as held by burgage tenure.

This estate also conferred on its owner the right of defending the title for that interest which he had in the land (*e*); and, indeed, for the interest of all other persons whose estates were dependant on his ownership.

A judgment against him, on a demand of the right and inheritance, was, in effect, a judgment against those in reversion or remainder ; and took the seisin from them ; rendering it necessary that they should become *demandants* instead of being *defendants* of the right.

Hence it was a forfeiture for a tenant for life to join the *mise* on the mere right, in a writ of right (*f*).

On the other hand, the privity or connection between the freeholder and reversioner or remainder-man, gave the mere freeholder, when the inheritance was demanded from him, the right of praying aid from the reversioner or remainder-man, so as to bring him forward to defend the title, by the plea of any release, warranty, or other matter which would afford an available answer against the claim of the demandant in the action.

While the tenant of a particular estate of freehold performed those terms of stipulation on

(*e*) 4 Burr. 107. by Lord Mansfield.

(*f*) 1 Inst. 281 b.

which he accepted his estate, he was entitled to hold the land during the period for which it was granted, without any dependance on his lord, or regard to his will; and he might hold it, on these terms, against the will of his lord; for the lord had not any possible means, directly or indirectly, to defeat his estate. To defeat the estate, there must have been a forfeiture by the tenant, by a breach of a condition implied by law, or expressly and by contract annexed to his estate.

So cautious, also, was the law (*g*), at this early period, of preserving the interest of this tenant; that the land could not be recovered in any action, unless the tenant of the immediate freehold was called on to defend the title. Hence it became a maxim of law, that all real actions must be brought against the tenant of the immediate freehold; at this day, called the tenant to the *præcipe*; the short denomination given to the writ of *præcipe quod reddat*, by which the right of real property is generally demanded; being the first word of the mandatory part of that writ.

The estate of this tenant takes its appellation from the circumstances of his tenancy, or his condition in regard to his tenement; with a view partly to the quantity and duration of his interest, and partly to the quality of the tenure.

(*g*) *Dormer v. Packhurst*, 3 Atk. 135; 4 Brown. 405; per Lord Mansfield in *Horde v. Atkins*; 4 Burr. 107; *Freeman v. West*, 2 Wils. 165.

It excludes, on the one hand, interests which are of a chattel quality, and, on the other hand, those interests which are not freehold in quality (as copyhold), though they, in some particulars, partake of the qualities of freehold interests.

The interests of tenants by *elegit*, statute-merchant and statute-staple, are of a chattel quality, although these tenants are indulged with the remedy by assize to establish their title; while the assize was at the common law, a remedy peculiar to those who had interests of a freehold quality. It was the *festinum remedium* of those who were ousted from their freehold, and was superseded, in general practice, by the action of ejectment.

As the owner of a freehold estate held independently of the will of his lord, his interest, in contradistinction to the interest of termors for years, or villeins, or copyholders, whose estates were liable to be determined at pleasure, was described by the word freehold; a term of art, denoting, in former times, the quality of the estate, as indefeasible at the mere will or caprice of the lord, whenever he should think proper to exercise the one or signify the other.

This is evidently the sense in which *Bracton* uses the words *liberum tenementum* (*h*); and it is from the translation of these words into English, that we have the term freehold. He says, "*liberum tenementum dicitur ad differentiam*

(*h*) *Bracton*, lib. 4. p. 22. 224; 1 *Inst.* 43 b. 345 a; *Fleta*, lib. 5. c. 5. § 16; *Dalrymple*, 9, 10. 21, 22.

villenagii et villanorum qui tenent villenagium, quia non habent actionem nec assisam, &c. Item quod sit suum, et non alienum; hoc est si teneat nomine alieno, ut firmarius et ad terminum, vel sicut creditor ad vadium," alluding, most probably, as to the creditor, to extents by *elegit*, statute-staple, statute-merchant, &c.

In the laws of Scotland (*i*) the like distinction between freehold and chattel interests prevails; and the tenants of freehold interests and qualified fees, are, at the most early period of the juridical history of that country, described to have been *freemen* and *gentlemen*; while the husbandmen are noticed as having interests confined to one year. Soldiers, in other words, persons of rank, were the proprietors of estates of inheritance. Though freemen were owners of chattel interests, they were not in this country denominated from their *tenure*. The authorities do not prove more than that it was a peculiarity in the times, that freemen only were allowed to have interests of any extent and duration (*k*). Between pure *villeins* (who were merely slaves, and considered as part of the stock on the farm, *adscripti solo*, in like manner as slaves in the West Indies are considered at this day) and copyholders of some description at least, there was a wide difference.

All copyholders, it must be remembered,

(*i*) Dalrymple, 23.

(*k*) See Jacob's Dict. verb. *Furcam*; 1 Inst. 117-b; 2 Bl. Com. 92, 93.

are, in legal intendment, tenants, *at the will* only, of their lords, so far as they are to be considered as the *tenants* of a legal estate. Considered as beneficiary and customary tenants, in the nature of *cestui que trusts*, they have an estate according to the quality and degree of interest granted to them, be it for life, in tail, or in *fee*.

In classing offices, they are distinguished into offices of freehold, and not of freehold (*l*): and they are said to be of freehold, as giving a certain, stable, and fixed right to the person by whom they are to be exercised, and entitling him to *an assize*, on disturbance, so long as he acquits himself properly in the discharge of his duty; and not of freehold, as held *ad libitum*, and liable to be determined at the pleasure of the person in whom the right of appointment resides, without any reason to be assigned for the dismissal of the officer (*m*). *Fitzherbert*, therefore, very truly says, “a man shall have *an assize* of novel disseisin of an office, if he have the same for life; and the writ shall be *quod disseisivit eum delibero tenemento suo*.”

These positions, it is submitted, clearly prove the application of the word freehold, in the sense in which it has been explained.

It will be difficult to adduce any more direct authority in support of this explanation of the term.

(*l*) F. N. B. 178; Com. Dig. *Assize*.

(*m*) *Waller v. Baker*, 2 Wils. 414.

On its acknowledged application among modern lawyers, on the distinction made by all law writers between interests of a freehold and chattel quality, and their discrimination between interests of one sort and the other, great reliance may be placed ; and it is on these grounds that the definition exhibited and the account given in this Essay, are offered for consideration.

In process of time, the term freehold, as it expressed estates of a certain duration against the lord, was applied to describe the *quantity* of the interest of the tenants.

Hence the very nice and accurate distinction taken by Mr. Justice *Blackstone*, when he remarks, “ that some copyholders have a freehold interest, but not a freehold tenure.” Indeed, this is equally true of all copyholders (*n*), who have estates for life, in tail, or in fee. Customary freeholders, *viz.* tenants who have a freehold by custom (as the tenants of the lord of the forest of *Dartmoor*), fall under the same description ; for they have not a freehold interest in point of tenure, and as to all mankind ; though they have such interest as against the lord of whom they hold.

As against the world at large, they are tenants at the will of the lord ; while, as far as relates to the lord, they have an interest of stability and duration, corresponding, in extent, with a freehold interest. The term *freehold* is applied to the estate of these tenants ; and the tenants

(*n*) *Connolly v. Vernon*, 5 East, 51.

themselves are, to denote the quantity of their interest, denominated customary freeholders.

With a view to the difference between the quantity and the quality of the estate of the copyholder, some say a copyholder is possessed, others say he is seised: either expression is equally proper.

In point of quantity of estate, a copyholder is said to be seised; in point of quality of estate, as to tenure, he is properly said to be possessed: so that the term possessed or seised has, in fact, equal application to the estate of the copyholder, though different writers use the terms in the different senses; some, of describing the extent of estate; others, of describing the quality of the tenure.

In its ancient and strict signification, the term now under consideration, expressed that the tenant had a right to an estate to be held, with reference to the code of our ancient laws, independently of the will of any lord. In the general and common acceptance of the term, even at this day, when applied to lands held in socage tenure (*p*), the expression imports an estate which may continue, at least, for the period of a life. The estate, however, may be determinable on a collateral event, or defeasible by condition.

It is to the continuance and duration of the estate, and not to the continuance of the thing, or subject matter, that the term is applied.

(*p*) Litt. § 57; 1 Inst. 43 b.

Hereditaments which are incorporeal, as well as hereditaments which are corporeal, are the objects of this doctrine, and admit of the application of this term. So long as an estate of freehold subsists in the property, that estate will require the denomination of a freehold interest, without any regard to the subject of property in which the estate is subsisting.

From these positions it may be concluded, that the opinion sometimes advanced, asserting that an upper chamber in a house (*q*) is no frank tenement, is, at all events, questionable, probably erroneous. On principle, an upper chamber is a corporeal hereditament (*r*).

And an upper chamber is not only a freehold, but the subject lies in livery, and not merely *in grant* (*s*).

The interest, which passes to a man by a grant to him and his heirs of an *upper chamber*, will not cease by any accident to the house by which it shall be consumed or levelled to the ground. A grant of this sort gives to the grantee, and to those claiming under him, a right to have the house always kept, *quoad* the *chamber*, in *statu quo*, in point of *erection*, as it clearly does in point of *sustentation* (*t*).

Every estate of inheritance is necessarily an estate of freehold. It is more ample than *an* estate of mere freehold, and comprises all the time of that estate and more, and confers all

(*q*) 10 Vin. Abr. 202.

(*r*) Shep. Touch. 202.

(*s*) Shep. Touch. 202; 1 Inst. 48.

(*t*) F. N. B. 127.

the privileges and advantages annexed to an estate of freehold, with some other qualities (for instance, to be taken in continual succession,) which are not common to an estate of mere freehold.

An estate, merely of freehold, may have a descendible, or rather, transmissible quality, as will appear under the chapter in which Estates for Life are to be considered.

The persons, who take in succession as special occupants, have their title as persons designated, rather than as *heirs*. The statute law has placed them in the like condition as if they took by descent; making their right of succession liable to specialty debts; and their right of succession liable to the testamentary disposition of the *quasi* ancestor, unless the heirs of the body are special occupants (*u*).

In many instances, and for certain purposes, as to entitle a husband to be tenant by the curtesy, or a wife to be tenant in dower, it is said, the grantee, the husband or the wife, must be seised of *the immediate freehold*, and of the inheritance.

By these expressions it must be understood, that the husband or wife must be seised of the *first estate of freehold*; an estate, which by way of distinction is sometimes merely called *the freehold*, and at other times, *the immediate freehold*; at least, that the first estate

(*u*) 3 Abstr. 175; *infra*, ch. Life.

of inheritance, without any intermediate estate of freehold, must be in the owner of the estate of the immediate freehold.

In these instances, the word freehold expresses the quality of the estate, as giving the right to the immediate freehold; and the word inheritance imports that the estate must be transmissible to a class of heirs, and that these heirs are to take by succession in a course of descent from the owner.

Also, for giving validity to a common recovery, to be suffered by a donee or heir in tail, the tenant to the writ of entry must have the freehold (*x*); and all writs of entry and of right must be brought against the person who is tenant of the immediate freehold; or the writ may be abated by a plea of non-tenure (*y*).

The rules relating to the freehold, are now to be introduced.

It may be assumed as a general rule, that the first estate of freehold passing by any deed or other assurance, operating under the rules of the common law, cannot be put in abeyance (*z*).

This rule is so strictly observed (*a*), that no instance can be shown in which the law allows the freehold to be in abeyance by the act of the party.

(*x*) 1 Convey. 3.

(*y*) Booth's Real Actions.

(*z*) 5 Rep. 94; 2 Bl. Com. 165; 1 Burr. 107.

(*a*) 2 Bl. Com. 165; 5 Rep. 194; Com. Dig. Abeyance.

The case of a *parson* is not an exception to the rule; for it is by the act of law, and not of the party, that the freehold is, in this instance, in abeyance, from the death of the incumbent till the induction of his successor (*b*); and, considered as an exception, it is not within the reason of the rule. This will be evident from the observations to be made in a subsequent part of this chapter.

From this rule the following points may be collected.

1. A limitation of an estate of freehold (*c*) in corporeal hereditaments, as lands of any description; or incorporeal hereditaments already created, as rents, commons, &c. held either in possession, reversion or remainder, to commence at a future day, or on an event, is, with the exception, perhaps, of grants under the law of exchange (*d*), void in the first instance, unless granted by way of remainder, and, even in that case, expectant on an estate of freehold, sufficient to support the remainder.

2. Although an estate of freehold (*e*) granted in remainder of a preceding estate of freehold, and to commence on a contingency, or at a future day, may be good in its limitation; yet, that the same may be good in event and vest in interest, the time when, or the event on which the remainder is to commence in interest, must,

(*b*) 1 Inst. 341 a.

(*c*) 2 Bl. Com. 265. 171; Plowd. 156; 8 Rep. 74 b.

(*d*) Perk. 265; Shep. Touch. 293. *Sed quære.*

(*e*) 2 Bl. Com. 168; 2 Rep. 51; 1 Rep. 138.

with one exception, arising from the express provisions of an act of parliament (*f*); happen during the continuance of the particular estate by which it is preceded, or at that very instant in which the particular estate shall determine; in other terms, every remainder must vest during the particular estate, or *eo instanti* that the particular estate determines.

A right of entry under a particular estate will support a contingent remainder (*g*).

But a right of action under a particular estate would not support such a remainder (*h*).

3. An estate of freehold may not be granted in corporeal hereditaments, or in incorporeal hereditaments already created, to exist at intervals only, and not continually (*i*).

The first branch of the rule is confined to corporeal hereditaments, as lands; and incorporeal hereditaments already created, as rents, &c.; it does not extend to rents, or any other incorporeal hereditaments, when a limitation of them, to be enjoyed for an estate *in futuro* or on a contingency, is made at their first creation (*k*).

A grant of a rent *de novo*, for an estate of freehold, to commence from a future time or on an event, is indisputably good (*l*).

This branch of the rule has place as well in conveyances of the immediate freehold, as of

(*f*) 11 W. III. c. 16.

(*g*) Fearn, 212.

(*h*) Per Holt, in *Thompson v. Leach*, 12 Mod. 174.

(*i*) Shep. Touch. 127; 8 Rep. 17; 14 Ed. III. 29.

(*k*) Shep. Touch. 127.

(*l*) Plow. 156.

estates carved out of a reversion or remainder expectant on a preceding estate of freehold (*m*); and whether the conveyance is made by feoffment or grant, or by release or confirmation in enlargement of an estate, the doctrine of the rule is equally applicable.

Thus a conveyance for an estate of freehold (*n*) to commence at a future day, or on an event, made by a person seised of the fee-simple; and having the possession of the land in right of that estate, is, with the exception of an exchange and estates for years to be enlarged on condition (*o*), absolutely void.

So also is a conveyance, made, in like manner, by a person seised of the reversion or remainder in fee, expectant on an estate of freehold, and who consequently has not the possession (*p*).

Thus, if *A* be tenant for life, or in tail, remainder in fee to *B*, and *B*, during the continuance of the estate for life, grant the land to *C* for an estate of freehold after next Michaelmas, the grant will be void.

And, for the same reason, the grant (*q*) of the first estate of freehold, on any conveyance to a person unborn, or to a person not ascer-

(*m*) 2 Rep. 55; 8 Rep. 74 b; *Hodge v. Crosse*, cited Hob. 171.

(*n*) 2 Rep. 55.

(*o*) 1 Inst. 217.

(*p*) *Buckler's case*, 2 Rep. 55; Bridg. 109; *Barwick's case*, as to a reversion expectant on a term for years, 2 Rep. 93; *Swift v. Eyres*, Cro. Car. 546; Jones, 435.

(*q*) Butler on 1 Inst. 216 a; 1 Inst. 217 a.

tained, is absolutely void. For, in regard to the application of the rule, it matters not by what means it is attempted to put the freehold in abeyance. The conclusion is the same, whether the attempt be made by limiting the estate, in express terms, to commence in future on a conveyance sufficient to pass the freehold immediately ; or by marking a future time, or a particular event, for the commencement of that estate ; or giving it to a person who has not the capacity of taking the same immediately.

And though an interest for years may commence from a future day ; yet, if a term for years be granted, *by deed*, to one person, as a future interest, and an estate of freehold be limited to another person, by way of remainder on that estate, and livery of seisin in the case of lands in possession, or the delivery of the deed, in the case of a grant of lands in reversion, or incorporeal hereditaments, as tithes (*r*), be made before the day on which the term is to commence in interest, the remainder will be void.

When the estate of the tenant for years is to commence from a future time, the interest limited in remainder of, and expectant on that estate, must also be future ; and the law will not allow effect to such a limitation of an estate of freehold.

(*r*) *Swift v. Egres*, Cro. Car. 546 ; 2 Abstr. 146 ; Vin. Abr. tit. Reversion ; *Wood v. Pettifer*, Cro. Car. 362 ; 10 Vin. Abr. 205 ; 2 Roll. Abr. 7. pl. 8 ; Cro. Eliz. 344 ; 1 Inst. 217 a.

In a case with these circumstances, the term for years will be good, and the remainder void (*s*).

That these positions may not be applied, by analogous reasoning, to other cases, apparently within the principle of this determination, it should be understood, that estates which are limited, expectant on the determination of contingent remainders, may be vested while such preceding remainders remain contingent; and may come into possession though the contingent remainders should fail of effect. When a devise is made, or use limited, under circumstances similar to the stated case of a grant for years, to commence at a future day, with an estate of freehold, expectant on that term, the several limitations will be good; the second limitation having operation and effect in wills under the doctrine of executory devises, which leaves the freehold in the heir at law, till the devise can operate with effect (*t*), and, as to uses, by springing use, which leaves the inheritance in the author of the uses. But if a grant be made to one for years, remainder to another for an estate of freehold, and the commencement of the remainder is future, and not taken up with reference to the determination of the term of years, the interest intended to be limited by way of remainder, will, as already noticed, fall within the extent

(*s*) 2 Abstr. 146.

(*t*) *Gay's case*, Cro. Eliz. 878; Cas. temp. Talb. 51; *Harris and Barnes*, 4 Burr. 2157.

of this rule, and cannot take effect. The remainder will be void for want of a preceding estate of freehold to support it.

And it will be remembered, that in the instance of a grant to one for years determinable on a life, and after *the decease* of the person on whose life the term is determinable, then to another person for an estate of freehold, the remainder will be deemed *vested*, if the term be of that extent, that, in all human probability, it will exceed the life of the person on whose death it is to determine, although the commencement of the remainder is taken up from the decease of the *cestui que vie*, and not, as it ought to be, from the regular and proper determination of the estate for years. In this instance there is not a future estate for years. The only question would be, whether there is an interval between the end of the term and the commencement of the remainder.

It may be proper to observe, in this place, that when the time at which the freehold is limited to commence elapses, in the cases of feoffment, before the livery of seisin is made, and in other assurances operating by deed, before the deed is delivered, these assurances will be good (*u*).

(*u*) *Greenwood and Tyler*, Hob. 314; *Cro. Jac.* 563, S. C. *Banks and Brown*, Moor, 759, S. P.; *Hetley*, 21; *Palm.* 29; 2 *Rep.* 35; *Hayward's case*, *Bowles and Smith's case*, cited *Hetl.* 21; *Hogg and Cross*. Feoffment to commence at a future day, and livery in person according to the form, &c. is not good. 1 *Inst.*

Thus, *Anthony Long* and *Alice* his wife, by indenture made between themselves of the one part, and *John Fisher*, of the other part, leased to *John Fisher* and others, lands in *Bar*, to hold the same to the said *John Fisher*, and the others and the survivor of them, successively, from the Feast of *St. Michael* the Archangel then next coming, unto the end and term of their natural lives and livery of seisin; was made by *Long* and wife, in person, after the said Feast, to *Fisher* and the others, according to the form and effect of the indenture.

On a writ of error it was determined, that livery of seisin made by the husband and wife *after the Feast* was good.

And in *Greenwood and Tyler (x)*, (a case of conveyance by feoffment,) a difference was taken between livery by the parties in person and livery by attorney. This point relates more immediately to the execution of deeds under a letter of attorney, and is foreign to the subject of this Essay. It is sufficient to remark, that, though the party may make livery after the day, an attorney cannot do so without an express power for the purpose. In *Freeman v. West (y)*, the limitation of estate was from the *day of the date*. The letter of attorney was to deliver seisin according to the effect, tenor, and true meaning of the lease;

48 b; 13 Vin. Abr. 193, 194; but see 2 Wils. 165; *Mallow and May*, Moor, 637; Cro. Eliz. 873; 10 Vin. 103.

(x) Hob. 314.

(y) 2 Wils. 165.

and it was determined, that this power warranted livery of seisin on the 25th day of May, in the year 1751, though the lease was dated the 25th November 1750.

Cases of the same description as *Greenwood* and *Tyler*, are not within the reason or the extent of the rule; for assurances cannot operate, under the circumstances of these cases, to place the freehold in abeyance. A feoffment or other assurance, to hold from a day past (*b*), is, virtually, in the case of a feoffment, to hold from the time when livery of seisin is made; and in the case of an assurance, operating by deed, from the delivery of the deed.

It is from the time when livery of seisin (*c*) is made, that a feoffment begins to operate on the seisin or estate; and it is from the time of its delivery, that an instrument, requiring to be executed with the solemnities essential to a deed, has its effect.

Till livery of seisin on feoffments, or till the delivery of deeds of grant, nothing passes from the former owner. The freehold continues in him till the intended conveyance begins to operate; and its operation commences in the former case from the livery of seisin, and in the latter case from the delivery of the deed.

These are the reasons on which the courts of justice have proceeded in instances of this sort,

(*z*) *Freeman and West*, 2 Wils. 165.

(*a*) *Ibid.*

and have decided the questions before them. Therefore, in observing on the case of *Freeman v. West*, Lord Ch. J. Pratt, afterwards Lord Camden, said, "By the warrant of attorney to deliver seisin in the present case, the intention of the parties was, that the deed should be substantiated by the livery, and in the mean time the freehold was in the grantor (b)."

It is also to be observed, that although the limitation of an estate of freehold may sound prospective or future, and on the face of the instrument appear to be void on that account; yet, as often as it is proved, or turns out in evidence, that estates of freehold were by some former instrument extended to that period, at which the estate, granted by the instrument in question, is to commence, and the time at which, or the event, not being a contingent one, on which the estate is thereby limited to commence, is the regular and proper determination of the estate already existing, the future words in the clause of limitation will be construed to fix the time at which the estate, thereby conveyed, shall commence in possession, and not to the time at which it shall commence in interest.

With this construction they do not import any contingency, unless the contingency be of such a nature, as in *Arton and Hare* (c), that it refers to an event which may or may not happen.

(b) See also Vin. Abr. Reversion, G. pl. 13.

(c) Poph. 97.

The case of *Weale* and *Lower* (*d*), the doctrine in 10 Rep. 107 b. and in *Passmere v. Prowse*, Cro. Eliz. 323, and *Dyer* 376 b. and the language of the Court in *Badger* and *Lloyd* (*e*), are authorities for this construction.

In *Weale* and *Lower* (*f*), *A* made a feoffment to the use of himself for his life; and after the death of himself, and *M* his wife, to the use of *B*, the eldest son of *A*, for his life; and it appearing in evidence, that *M* had an estate for life, under a former deed, *Hale*, Ch. J. held, that the mentioning the death of *M*, was only expressing when *B* should be entitled to the possession. And according to the case put in the 10th Report (*g*), a lease for life was subsisting, and a grant was made of the reversion, to hold for life after the death of the lessee; and it was held, that the grant was good; and as it was said on that occasion "to limit an estate after the death of the lessee, is, in construction of law, to grant that it shall commence in possession when the estate of the lessee shall be at an end." So also a grant of the reversion, when, after the death of the tenant for life, it shall fall (*h*), has been construed a good and present grant of the reversion, notwithstanding the words of the grant do not in sound, or sub-

(*d*) Pollexf. 66.

(*e*) 1 Salk. 232; 1 Lord Raym. 543.

(*f*) Pollexf. 66.

(*g*) The case of *Stephen de la More*, 5 Ed. III. 37; 1 Inst. 21; Roll. Rep. 256.

(*h*) Cro. Eliz. 323; *Dyer* 376 b; 1 Saund. 151.

stantively, without reference to the lease for life, appear to pass the estate immediately.

And in *Badger v. Lloyd (i)*, a man was seised of the reversion, after an estate-tail, and devised to another, after failure of issue of the donee in tail; and the Court of King's Bench held it to be an immediate devise of the reversion expectant on the estate-tail, and therefore good. And it was declared by *Holt*, who delivered the resolution of the Court (*k*), "that though the estates devised are after the death of tenant in tail without issue, yet the reversions pass immediately, only they will not take effect in possession till the estate-tail is determined;" and (with reference to the question then before the Court, he said, in this case,) "present estates in reversion do pass; and, in construction of law, they are limited, after the determination of the particular estate." The judgment was affirmed in the Exchequer Chamber, and House of Lords.

In all the cited cases (*l*), the estate, limited by the conveyance, was to commence at the period when the estates, already subsisting, would regularly and certainly determine; and these and the like cases are alone open to the observations already made: for, when the last of several particular estates already existing is to determine at one time, and the estate, limited

(i) 1 Lord Raym. 523; 1 Salk. 232.

(k) 1 Lord Raym. 525.

(l) *Lady Lanesborough v. Fox*, Cas. temp. Talb. 262; *Jones and Morgan*, MS. Cases; and 7 Bro. P. Cas. 130.

by the conveyance in question, is to commence at any other time, then, and notwithstanding that time may be the period for the regular and proper determination of some particular estate, though not of the estate which is last in the order of limitation, and on which the reversion or remainder is immediately expectant, the limitation will be void.

In these instances, the future words in the limitation cannot be construed to mark the time at which the estate is to commence in possession, because it may not take effect in possession at that time (*m*).

And when the estate already subsisting is determinable on a contingent event, and the interest under the new conveyance is limited to commence on that event (*n*), this interest will be contingent, because the event is of such a nature that it will not certainly take place. The principle of *Arton* and *Hare* governs cases of this description.

That no confusion may arise, it will be right to observe, on the case of *Lady Lanesborough v. Fox*, that if the several clauses of limitation in the settlement and in the will had been all inserted in the same will, the construction of law would have been, that the limitation in question was to give an estate on the failure of such issue as were mentioned in the former

^(m) And see Note to Rep. Cas. temp. Talb. 268.

⁽ⁿ⁾ *Arton* and *Hare*, Poph. 97.

clause; and agreeable to this construction, they would have introduced a good and proper remainder.

Again, a grant by a person who has an estate in *remainder*, to hold from the time at which the remainder is to commence in possession, is a grant of a present and vested interest, and within the reasons already noticed.

But in the case of *Brain and Deakin (o)*, which was heard in the House of Lords, 1728, "there was a settlement to uses, some of which were to particular takers and the heirs of their bodies, with reversion in fee to the settlor. This settlor, by a subsequent deed, conveyed his reversion to two nominal trustees and their heirs, to hold *from and after the determination of the precedent estates limited by the first settlement*, (some of which were estates-tail as aforesaid,) to the use of particular persons and their heirs. This *habendum* was held too *remote* and void, inasmuch as nothing could vest so long as there was issue of any of the takers under the first settlement; and therefore the persons who were to have the benefit of that subsequent grant, would be made to wait from generation to generation for the estate intended to be given them thereby."

But it is apprehended, the case as stated is not warranted by any principle of law.

So when a person who has two separate and *distinct estates*, one in possession, another in

(o) From a MS. opinion of Mr. Booth.

remainder or reversion, grants his remainder or reversion, still retaining his particular estate, this grant will be *good*, to pass the remainder or reversion, at the same time leaving the particular estate in the grantor.

When, indeed, a person has two estates, he ought to grant his remainder as a remainder, and his reversion as a reversion; and in general *eo nomine*; as often as there is an intention to retain the particular estate.

This branch of the rule is applicable to those modes of assurance alone, which, of necessity, according to the effect ascribed to them by law, must pass an estate of freehold immediately, or otherwise never can operate to give an estate of that quality.

Grants to enlarge an estate on condition (*p*), and, as to uses, limitations to take place by *springing use*; and gifts by executory devise; do not necessarily operate on the freehold *immediately*; and declarations of trust do not pass the estate itself: they merely give a right to a conveyance of the estate.

These several interests, therefore, do not fall within the object of this doctrine.

With the exception of these instances, this branch of the rule is general, and applies to all other limitations, by whatever means they are made.

At the same time, it must be observed, that

(*p*) 1 Inst. 216 a; 1 Rep. 154; 2 Lev. 77; Tr. on Eq. 61, § 6; *Hopkins and Hopkins*, 1 Atk. 579.

even under the doctrine of uses and of devises, limitations sounding futurely, and, in fact, having future objects, may give present and immediate estates. This construction arises from the *implication* of a prior estate, equal to the period of time of which no disposition is made in express terms (*q*). Thus, in *Pybus v. Mitford*, already cited, *A*, seised in fee, covenanted to stand seised to the use of his heirs male begotten, or to be begotten on the body of his second wife. On the principle laid down by Lord Coke, that so much of the use as the owner of the land does not dispose of remains in him, it was held by *Hale*, Chief Justice, and two other judges, that *A* took an estate for his own life by implication.

The like determination was made in the case of *Willis v. Palmer* (*r*), a case of frequent reference in this Essay.

And in *Roe* on the demise of *Wilkinson v. Trimmer* and others (*s*), deeds, in the form and language of a lease and release, were made by *Thomas Kirby* to *Christopher Kirby* his brother. The indenture of release stated the consideration to be the natural love which *Thomas* bore for his brother, and 100*l.* paid to him by his brother. The grant in the premises of the deed was to *Christopher*, after the death of the said *Thomas*

(*q*) 1 Vent. 372.

(*r*) 5 Burr. 2615.

(*s*) Willes's Rep. 682; 2 Wils. 72; see also Cro. Eliz. 439; and the observations of Lord Holt, in *Davies v. Speed*, 2 Salk. 675, and of Bacon on Uses, p. 59.

Kirby, to hold unto the said *C. Kirby*, and the heirs of his body lawfully begotten, with remainders over: part of the consideration-money was paid, and the residue secured; and a receipt for the consideration-money was indorsed on the indenture of release. The Court were all of opinion, that the release was void as a common law conveyance, it being to convey a freehold to commence in future; but that it should have the effect and operation of a covenant to stand seised to uses. The Lord Chief Justice delivered the opinion of the Court. He said, it was admitted and agreed that this deed was void as a release, because it was a grant of a freehold to commence *in futuro*; and therefore, he said, the only question was, whether it should take effect as a covenant to stand seised to uses; and that they all were of opinion it should. And after citing from *Sheppard's Touchstone of Assurances* the rule of construction, that when the intent is to pass the land one way or another, there it might be good either way, he observed, that by the word intent was not meant the intent of the parties to pass the land by this or that particular mode or form of conveyance, but an intent, that the land should pass *at all events* one way or another; and added, although formerly, according to some of the old cases, the mode or form of a conveyance was held material, yet, in later times, where the intent appeared that the land should pass, it had been ruled otherwise; and certainly, it is more rea-

reasonable to make the intent good in passing the estate, if by any legal means it might be done, than by considering the manner of passing to disappoint the intention and principal object which was to pass the land. He then enumerated the circumstances which were essential to the validity of a covenant to stand seised, and concluded, that the indenture of release was a good covenant to stand seised to uses; and the whole Court were clearly of opinion, that a man might covenant to stand seised to the use of another person after the covenantor's death. Nothing was said by the Court of the relative quality of the estate: they did not say, nor was it necessary for them to advert to that point, whether the estate of *Christopher* took place by springing use, leaving the fee in *Thomas*, or by remainder, and consequently reducing him to the situation of a tenant for life. From *Pybus* and *Mitford*, and the several principles which govern estates by springing use, it is reasonable to conclude, that an estate for life arose to *Thomas* by resulting use.

The case of *Harris* and *Barnes* (1), is an authority for the inference which has been drawn in the application of these observations to wills. *Tenny v. Agar*, and *Romilly v. James*, already cited, extend this learning of gifts by implication to a new series of cases; but they are grounded on the same principle as gave rise to cross remainders by implication.

(1) 4 Burr. 2157.

On grants of estates for years, to be enlarged on a condition, or, more properly speaking, on a contingency expressed in a conditional limitation; and on limitations of use, and gifts by devise, this remark will be relevant.

After the first estate of freehold (*x*), limited by any of these modes of assurance, becomes vested, all the contingent interests of freehold, expectant on that estate, by way of remainder, will be liable to the doctrine of the second branch of the rule; and unless they vest in interest, before the determination of all the estates of freehold limited to precede them, and in respect of which they are remainders, they will be void, for want of an estate of freehold to support them. As soon as the first estate of freehold, conveyed by either of these means, vests in the person to whom it is limited, the freehold is affected by the assurance; and all the rules which provide against the abeyance of the freehold, attach on the seisin, even to the exclusion of those persons who are incapable of taking when the particular estate shall determine (*y*), although the gift in remainder be to a class of persons, and some of these persons are capable of a vested interest, when the particular estate determines (*z*).

And probably too, (indeed from the spirit of the law, it should seem beyond all question),

(*x*) Fearn, 453. (*y*) See *infra*.

(*z*) *Mogg v. Mogg*, 1 Meriv. 654.

though a term may be enlarged on condition; and in case of a grant of a *term for years only*, the freehold may remain in the grantor, or, in some cases, the grantee, till the condition arises; yet, in all other instances, as where a vested estate of freehold is limited to any person, the estate, limited by way of enlargement, will be the subject of the doctrine of contingent remainders, rather than of estates to arise on condition in enlargement of a preceding estate.

In regard to estates for years, to be enlarged on condition, it may appear doubtful, whether the fee must not pass immediately, or whether it may wait for the event expressed in the clause of conditional limitation.

From a thorough investigation of the cases on the point, it will be manifest, that the fee will pass immediately, or wait till the performance of the condition for its commencement into estate, according to the nature of the assurance by which the estate is conveyed.

The assurance of things lying in *livery* (a) must be perfected by the ceremony of livery of seisin; and when the estate to be enlarged is of *freehold*, the fee will not arise till the condition shall be performed, or the contingency happen.

On the contrary, when the preceding estate is *for years*, and the lands lie in livery, the fee will pass immediately; because livery of seisin must be made in the first instance; and that

(a) Litt. § 350.

ceremony necessarily passes an estate of freehold at the least: and passing an estate of freehold, it must give the extent of interest expressed by the words of limitation; and that is a fee.

The same mode of assurance which is proper for the conveyance of an estate in fee, in things lying in grant, is equally proper for passing an estate for years; and under a conveyance by grant to a man for years, and to the same person in fee, upon a condition to be performed, the grantee may, consistently with the intention of the parties, and the mode of assurance which is adopted, have an estate for years till the condition shall be performed; and afterwards, an estate in fee. The law makes the construction which will promote that intention. Of things lying in livery (*b*), livery of seisin must be made in the first place, as often as an estate of freehold is to arise under that assurance; and livery of seisin necessarily passes an estate of freehold: so that when several limitations are made, one for years, the other in fee, the person to whom livery is made will have the fee immediately; and afterwards, when that estate is defeated by the condition, a term for years. The 349th and 350th sections of *Litt.* support the most material branches of this position; for *Litt.* says (*c*), "Also, if land be granted to a man for a term of two years, upon such condition, that

(*b*) 1 Inst. 217 a; Butler on 1 Inst. 271 b; 1 Burr. 92; *Litt.* § 349, 350.

(*c*) Sect. 349; 1 Inst. 216.

if he shall pay to the grantor, within the said two years, forty marks, then he shall have the land to him and to his heirs ; and in this case, if the grantee enter by force of the grant, *without any livery of seisin* made unto him by the grantor ; and after he payeth the grantor the forty marks within the two years, yet he hath nothing in the land but for term of two years ; *because no livery of seisin was made* unto him at the beginning ; for if he should have a freehold and fee in this case, because he hath performed the condition, then he should have a freehold by force of the first grant, where no livery of seisin was made of this, which would be inconvenient, &c. But if the grantor had made livery of seisin to the grantee by force of the grant, then should the grantee have the freehold and the fee upon the same condition.

“ Also (d), if land be granted to a man for a term of five years, upon condition, that if he pay to the grantor, within the two first years, forty marks, that then he shall have fee, or otherwise but for the term of the five years, and livery of seisin is made to him by the force of the grant ; now he hath a fee-simple, conditional, &c. And if, in this case, the grantee do not pay to the grantor the forty marks within the first two years, then immediately after the said two years past, the fee and the freehold is and shall be adjudged in the grantor ; because that the grantor cannot, after the said two years,

presently enter upon the grantee; for that the grantee hath yet title, by three years (c), to have and occupy the land, by force of the same grant; and so because that the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grantee in this case makes waste, then after the breach of the condition, &c. and after the two years, the grantor shall have his writ of waste; and this is a good proof then, that the reversion is in him," &c.

These sections of *Littleton* prove, that as the things were in livery, and an estate of freehold was to pass, it could not pass by a mere deed, though by the intention of the parties, it was to vest at a distant time, or on a contingency, and in enlargement of an estate for years. They also prove, that it was necessary that livery of seisin should be made in the first instance, in order that the fee might pass immediately.

In cases of this sort, it is the nature of the assurance, and not the intention of the parties, which governs the construction.

The intention is the same in each case; but as that intention may not, by reason of the ceremonies with which the parties have perfected their assurance, have effect in exact conformity with the words in which the intention is expressed, it must have effect as it may, under the rule

(c) 3 *Convey.* 510.

that cum quod ago non valet ut ago, valeat quantum valere potest. In one case, the words which give the estate in fee, are, in construction of law, a conditional limitation, or, as they are more frequently stiled, a condition or *contingency* (*f*) precedent to the vesting of the estate. In the other instance, they are properly called a condition to defeat the estate, and they operate accordingly. For the same words will, in different instruments, be construed words of limitation or of condition, according to the nature of the several instruments, and the effect these instruments shall have, in accomplishing the intention of the parties, consistently with the rules of law.

Indeed, it is a general rule, that words shall operate as a condition precedent or as a condition subsequent, as will best answer the intention of the parties (*g*).

As to things *lying in grant* (*h*), the fee will not vest in interest till the contingency shall arise, or the condition, as it is sometimes termed, shall be performed. This is equally the result, whatever may be the extent of the particular estate; either for years or for life.

A limitation of this sort, in a grant, when a particular estate to be enlarged is for years, bears great affinity to those limitations which

(*f*) Litt. § 350.

(*g*) *Broomfield v. Crowder*, 1 New Rep. 313; *Dox v. Newell*, 1 M. & S. 327.

(*h*) Litt. § 349; 1 Inst. 207 a.

are termed executory devises, and also to those limitations under which springing uses have effect.

These differences, it is apprehended, reconcile all the cases on the point. Great pains were taken by Lord *Coke* to collect the cases into one view, as they now appear in the first volume of his *Institutes* (i).

A perusal of the cases, either in the works of this much esteemed writer, or in the books at large, from which his collection was made, will, it is believed, fully prove the distinctions submitted to the reader.

When estates of freehold are to pass on a condition or contingency, in enlargement of an estate for years, without the intervention of any estate of freehold, the freehold will remain in the grantor, till the time shall arrive at which the condition is to be performed. This observation will suffice to point to the reason of the decision which cases of this description have received. And it is further to be observed, that when on a conveyance to uses (k), the first limitation of the use is to a person unborn, or to commence at some future period, the use of the entire fee will result in the mean time; till the first estate of freehold may vest, according to the limitation; so that the immediate freehold will not, at any time, be without a tenant.

(i) s16 b.

(k) Butler on 1 Inst. s16 a.

Declarations of trust are not within (l) the compass of the observations offered on any part of the doctrine of the freehold, while the interest they pass continues to be merely equitable. Though the estate to which these declarations entitle the owner of the trust, will be of freehold when the trust is executed into estate by a conveyance of the land in performance of the trust; yet, till the conveyance is made, the legal estate will remain in the trustee: and the person in whose favour the trust is declared, has a mere beneficial interest, by way of equitable estate, of consideration only in courts of equity, and not any title at law.

Hence it follows, that contingent remainders of an equitable interest, may have effect, although the particular estate shall determine before the remainder can vest in interest (n). In the interval, after the determination of the particular estate and the commencement of the remainder, the rents and profits will belong to the grantor; or, in case of gifts by will, to the heirs at law of the testator, by way of resulting trust (o).

Also in the case of executory devises (p), in

(l) *Chapman v. Blissett*, Cas. temp. Talb. 145; *Hopkins and Hopkins*, 1 Atk. 590; Butler on 1 Inst. 216.

(m) *Chapman v. Blissett*, Cas. temp. Talb. 145.

(n) *Hopkins v. Hopkins*, Cas. temp. Talb. 44; 1 Atk. 590.

(o) *Pay's case*, Cro. Eliz. 878; *Clerk and Smith*, 1 Lutw. 798; *Gore and Gore*, 2 P. W. 28; *Hopkins and Hopkins*, 1 Atk. 590; *Chapman v. Blissett*, Cas. temp. Talb. 145; Butler on 1 Inst. 216. a.

which the freehold may remain unaffected by the will, in point of seisin, for a considerable time, namely, the time prescribed by the rule against perpetuities, the freehold descends to the heir at law, or may pass to a residuary or even a specific devisee, until the freehold can vest. It follows, that this doctrine does not allow the freehold to be in abeyance. Till the devise shall operate to vest the freehold, the fee remains with the heir at law of the testator or devisee, subject to be defeated when the original devise shall take effect.

This position proves, beyond all question, as has already been shown, that an interest, while executory, cannot be properly classed among vested interests.

Trusts do not give any legal estate. They merely confer an equitable interest; the right to have a conveyance of the estate: therefore, though the interest of the owner of the trust may be of freehold, in point of quantity it is not, in the contemplation of a court of law, and for the purposes now under discussion, such in quality, till the legal estate is substituted for the equitable right, by reason of the trust.

The class of cases falling under the second branch of the rule, relate more particularly to the doctrine of contingent remainders, as applied to legal interests; for, as already observed, it is not applicable to equitable interests.

The learning on this abstruse head, is so fully and ably treated by Mr. *Fearne*, that nothing

short of a reference to his Essay on this subject, will exhibit all the subtleties in which this doctrine is involved. It will be sufficient for the purpose of this Essay, in addition to the few points incidentally noticed, to observe, that till the contingency arises, the interest depending on the contingency must be supported by some preceding particular estate of freehold vested in interest, and in relation to which, the estate to arise on the contingency, is a remainder. And unless there be such preceding vested estate, the remainder will be void in its limitation; and the remainder will become void in event, or rather fail of effect, unless it shall vest in interest before the determination of such vested estate, or in that instant in which that estate determines.

With reference to this rule, it may be observed, that the remainder may take effect in favour of some persons, and, as to other persons, fail of effect.

Thus, under a gift to *A* for life, remainder to the right heirs of *B* and *C*; the remainder may vest in the heir of *B*, because he dies in the life-time of *A*; and it may fail of effect, as to the right heirs of *C*, because the particular estate shall determine in the life-time of *A*, and before there can be any person who fills the character of his heir.

And the heirs of *B*, as the only persons capable of taking, will, it should seem, take the entirety, under the rule, that where there is a

grant to several persons, and some are incapable, or become incapable, the grant will be good in favour of those persons only, who are capable.

And under the learning of uses and devises, as far as they are to operate by way of executory devise, springing or shifting use, several persons may take vested interests, although they come *in esse* at different times : and even the immediate freehold may vest in one person or in several persons, and afterwards admit of a division among other persons as they come *in esse*, or become capable of taking ; yet, under the learning of remainders, whether by grant at common law, or by limitation of uses, or by devise, no one can take under the remainder, unless that person come *in esse*, or become capable before the determination of the prior particular estates : and therefore, although the remainder should vest in two or more children during the particular estate, other children, born after the determination of the particular estate, would not participate with them : and yet these children might take, if the gift was so made as to operate by way of executory devise or springing or shifting use (*p*), instead of operating by way of contingent remainder. The case of *Mogg v. Mogg* (*q*), illustrates and exemplifies this doctrine.

In that case, a gift was made to children born and to be born ; four were born in the life-time

(*p*) *Mogg v. Mogg*, in Chan. 1815. (*q*) 1 Mesiv. 654.

of the testator, and five after his death : the five children took under the learning of executory devises. They would have also taken, had the gift been by way of springing use.

Part of another farm was given to the testator's widow for her life, and the residue was given to trustees for the life of the testator's son : and after various other gifts, which failed of effect, to the children of Mrs. Mogg, born and-to be born, in tail, with remainder over ; and that part of the farm which was devised to the wife for life, was limited, by words of reference, to the same uses and for the same estates as the residue of the farm was limited ; thus clearly marking an identity of intention.

Four children were living at the death of the testator, another was born in the life-time of the son, and a sixth was in *ventre sa mere* at the son's death. Three other children were born after the death of the son and in the life-time of the widow, making, in all, nine children ; and it was decided, that as to the property devised to the wife for life, the nine children were tenants in tail : and the ground of the determination evidently was, because all these children were capable of the remainder before the determination of the particular estate ; while, as to the lands devised to trustees for the life of the son, it was held, that the six children only, including the child in *ventre sa mere*, who were *in esse* at the son's death, were entitled in exclusion of the three children, who came *in*

esse after the death of the son ; an exclusion which was contrary to the intention, but grounded on the fact, that they were *not in esse* at the determination of the prior estate, and for that reason, were incapable of taking under the remainder.

Hence the determination in *Mogg* and *Mogg*, is, that all the children who were to take under and by way of remainder, and who were not *in esse* at the determination of the prior estate, were excluded, and the remainder was retained by those children alone who were capable before the prior particular estate determined ; while all the children were capable under the gift by executory devise, at whatever time they should be born.

Thus the same will, and similar expressions in that will, received different determinations, on account of different rules of law applicable to the different gifts.

On the third branch of the rule, it has been determined, that a feoffment to one man and his heirs, to hold on every Monday ; to another man and his heirs, to hold on every Tuesday, &c. is void *(r)*.

And more generally that a grant of lands *(s)* or any incorporeal hereditament already created, for an estate of freehold, where the estate is to be suspended for some part of the time, (as during the infancy of the heir after the death

(r) 1 Rep. 87. As to Uses, Mo. 632. by *Walmsley*.

(s) 1 Rep. 87 ; *Shep. Touch.* 127 ; 1 *Cruise's Dig.* 9.

of his ancestor) is, as to the limitation or condition to *cease* the estate, repugnant to the policy of the law, and therefore void.

This branch of the rule does not extend to a grant of a rent, or common, or other incorporeal hereditament (*t*), on the creation thereof, *de novo*, that is, in the first instance. A clause for suspension of the estate, would, if inserted in such original grant, be good, and have the desired effect.

The principal authority for this conclusion, is the case in 22 Edw. III. 19 a b. ; and the principle and doctrine of that case have been established by more modern determinations.

The case at large, as reported in the Year Books, will best show the ground of the decision.

In dower by *Sibil*, who was the wife of *John Everwicke*, of 26*l.* of rent against the prior of *Bridlington*, *Mombrie* pleaded, that, in the time of *Edward*, the grandfather, one *John* and his wife acknowledged the tenements, out of which the rent is issuing, to the predecessor of the prior, and to his successors, &c. for which acknowledgment the predecessor, by the same fine, granted the rent to the said *John* the conusor and *A* his wife, and to the heirs of the wife, upon this condition, that as often as the heirs of the feme should be within age, the

(*t*) Brook, Judgm. pl. 41 ; Shep. Touch. 127 ; 24 Edw. III. 29 a b ; 1 Ch. Cas. 214.

prior and his successors should be quit of the rent until the heirs should attain their full age; and that when they should be of full age, then the prior and his successors should pay: and he showed the means by which the rent descended to the husband of the demandant; and that one *F*, his son and heir, was then under age, and demanded judgment, if at that time, *during the nonage of the heir*, the demandant was dowable: and he produced a record in the time of *Edward*, the grandfather, by which it was awarded, that a feme in such case should have judgment to recover; but that there should be a cesser of execution during the nonage of the heir.

And in Trinity term, 24 Edw. III. 29 b. it was awarded, that the feme should recover her dower, and that there should be a cesser of execution until the full age of the heir of the husband; and it was said by the whole Court, that when the heir was of full age, and the feme endowed, and the heir died, and his heir was within age, the rent of the feme for the time, (meaning the minority of the heir for the time being) should cease.

The necessary conclusion is, that the estate, in point of beneficial interest, was suspended during the minority of the heir, and yet the estate had continuance to some purposes.

The case is very different from those in which an estate already *subsisting*, is granted with a

limitation, which makes the right to the freehold depend on an event, or on the lapse of time, or attempts to leave it suspended ; for under limitations in these terms, there is not any tenant of the freehold, because there is not any estate of freehold in existence.

From this consideration of the difference of the several cases, it will be proper to distinguish them. For this purpose, it is to be observed, that in one case, the suspension seems to apply to the right of possession ; and in the other case, to the estate ; and then the several cases are not within a parity of reason.

To establish this distinction, would supersede many of the grounds of argument offered in a future page, as the reason for allowing grants *de novo* of rents, &c. to be good.

The arguments advanced and reasons assigned, are those by which the courts of justice seem to have been influenced ; and though the authority from which they are deduced, does not appear to warrant them, it would, at this day, be presumptuous to pass them over in silence.

From the several branches of the rule, it clearly appears, that the *law will not, by any means, nor in any case, allow the estate of the immediate freehold to be in abeyance* : by abeyance is to be understood expectancy, or the waiting for any event, however near, or the lapse of any time, however short ; and though it be for a day only, (*u*) to vest in estate

the interest which is given in a subject already existing.

This may appear to be a rule (*x*) of great strictness : indeed, the object to which it is directed, might have been attained by adopting the construction made on devises by will ; but, consistently with the notion the law entertains of the effects of its mode of assurance, and in particular of livery ; and for the sake of notoriety of every change of tenant, so important to lords and to the public, when the system of feudal tenures was in full operation ; it was required by good policy, and the general convenience of society, that the rule should be adopted ; and an adherence to it was of the utmost importance to the rights of lords, in respect of the feudal services, and to the public, in respect of the remedies by real action.

The distinction between estates in land or rents or other incorporeal hereditaments *already created*, and estates in rents or other incorporeal hereditaments on their creation *de novo*, illustrates the doctrine, and shows its application ; and with the observations to be offered on the reason of the difference, demonstrates, beyond all contradiction, that the rule is not so much of positive institution, without any foundation in reason, or reference to principle, as the necessary consequence of that leading maxim of the law, that a particular mischief is rather to be endured, than a general inconvenience introduced.

(*x*) Butler on 1 Inst. 216 a ; 1 Inst. 217 a.

Feoffments, and all other modes of assurance deriving their effect from the common law, except mere grants by deed to enlarge estates for years on condition, are supposed to pass the estate of freehold of the person who makes the assurance, immediately after the execution of that assurance ; and its perfection by those ceremonies, as livery, and before the statute for the amendment of the law, attornment, which were essential to the operation and validity of that assurance.

Therefore, as these assurances pass the freehold out of the granting party immediately, they must necessarily be construed, either to convey the same to the grantee, or place it in abeyance. Of necessary consequence, the conveyance must either pass the estate, or the limitation will be void.

The object of the law in prescribing certain rules for the regulation of property, is to induce the convenience arising from an observance of particular and approved forms. From the most early period, convenience has been a principle of municipal law. On the foundation of this principle, no argument in law hath greater weight in the determination of any case which hath for its subject *res integra*, or a question which never before received a decision, than an argument adverting to the policy of the law, generally termed *argumentum ab inconvenienti* (*y*) ; from pointing out clearly

(*y*) 1 Inst. 11 a.

that the permission of this or that act, or the allowance of effect to this or that limitation, would, in its general consequences, tend to the inconvenience of society.

On this principle of inconvenience (*z*), the common law denies effect to a limitation to one man *every Monday*; to another man, *every Tuesday*, and the like gift; and to a limitation to cease an estate in *land*, or any incorporeal hereditament already created, during the minority of the heir, or till the heir shall have a peerage, or be queen of England, or till the king of England shall have an eldest son; and to a limitation of an estate of freehold in lands, or any incorporeal hereditament already created, to commence at a future day, so that the freehold may be in abeyance.

To have allowed limitations in these forms to have the effect of the intention with which they were dictated, would have been contrary to the policy of law. The greatest inconvenience must have arisen, as the inevitable consequence. This was particularly the case when real actions were the practice of every day: and real actions, though seldom brought, are still available, and sometimes the only means of obtaining justice.

Allow the freehold to be placed in abeyance, and a person who has a prior and elder right to the land or other subject of property, com-

(*z*) Jones, 73; 1 Vin. Abr. 105; Ch. Cas. 214; Moor, 220; 1 Burr. 107. by Lord Mansfield.

prised in the limitation, would, in some cases, be delayed, in other instances prevented, from recovering his right, or prosecuting the necessary means, in order to the legal discussion of the title on which his right depends, and consequently the establishment of his title (*a*).

In one instance, the estate of freehold would be in abeyance during the minority of the heir. Of the property comprised in that gift, there of consequence would not, during the minority of the heir, be any person of whom the right might be demanded; and in the instance of a gift of an estate to one man every Monday, &c. no writ demanding the land could be sued on one day, which would not be abated on the next day, by the change of the terre-tenant.

In the former case, the person by whom the right is claimed, and in whom possibly it may reside, would be unreasonably delayed in his suit; and in the latter case, no suit could be prosecuted with effect, so as to be succeeded by a recovery of the land demanded.

In reference to lands or incorporeal hereditaments already created (*b*), an estate of freehold may not be limited out of them, to commence from a future period, or to be suspended for a time, so as to induce a result that the freehold may, at any time, be in abeyance,

(*a*) *Hopkins v. Hopkins*, 1 Atk. 590.

(*b*) *Shep. T.* 127; *Buckler's case*, 2 Rep. 55; *Moor*, 423; *Barwick's case*, 5 Rep. 94; *Hopkins and Hopkins*, 1 Atk. 590.

except in the case of a parson, &c. during the vacancy in the church, &c.

The most injurious consequences would flow from giving effect to gifts of this kind. The *right* of property may be in one person, and the *estate* of that property may be in another person. The person who has the title and not the estate, may seek the recovery of his right, and eventually, as his right shall be made apparent by proof, he may succeed in his suit; but when he had merely a right of action, and not of entry, enabling him to maintain an ejectment, he could, under the rules of the common law, and before takers of the profits were made liable to be deemed tenants to the *præcipe*, institute a suit against that person only who had the first estate of freehold. Had that estate determined while the suit was depending, the suit would have abated or determined, and a new suit must have been commenced; and so from time to time on every change of tenant.

It follows, that by gifts which would place the freehold in abeyance, or would delay the suit, or after any short interval, cease the estate as to one person, and then give it to another person, and so *alternis vicibus*, the person who has the right may, in one case, be delayed in his suit, and in the other case deprived of all possibility of recovering his right; and therefore might be prejudiced, by reason of the act of those against whom alone

he could prosecute his action to obtain his right, and would be so materially interested in making gifts which would lead to these consequences.

The necessity, under the feudal system, that there should always be some person to render the services of the lord, and to answer to the real actions brought to recover the property, introduced the maxim of the common law, that the freehold can never be placed in abeyance (c).

Though it be not allowed, that the first estate of freehold passing under any common law assurance should be in abeyance, yet any estate of freehold or inheritance depending on another estate of freehold, and to take place by way of remainder, expectant on that estate, may be limited in contingency, and consequently be in abeyance. The policy of the rule which denies to the owner the power of putting the freehold in abeyance, is, in fact, effectually attained by the rules applicable to contingent remainders, by precluding them of effect, unless they vest in interest during a preceding particular estate of freehold, or in the same instant in which the particular estate determines.

Between lands and incorporeal hereditaments already created on the one hand, and, on the other hand, a rent or common created *de nova*, there is a material difference. It is true, that rents and commons are interests in lands. These interests, however, are collateral to the lands

(c) 2 Wils. 165; 1 Inst. 216.

themselves. The person who takes interests of this sort immediately from the proprietor of the land, takes them originally; and there is neither any inconsistency or inconvenience in limiting them, so that they may cease or be suspended at intervals, or that they may not commence in estate, though the estate be a freehold in quality, till the arrival of a future period, or the rise of a particular event, not contravening the rule against perpetuities.

No one can be prejudiced by reason of limitations made, under these circumstances, of property of this sort; since, as to the rent or common, no one is in question, in point of benefit and title, besides the person to whom the rent or common is granted; and the rent or common cannot be lawfully claimed by any persons except those who derive title from or under the person to whom it was originally granted; and, deriving title in this manner, they must claim to hold the rent or common subject to the terms on which it was granted by the person from whom the title is derived (*k*). These terms, whatever they may be, form the *modus donationis*, and give a quality to the estate.

But, to limit a rent or other incorporeal hereditament already created, to commence at a future day, or on an event, or to be suspended at intervals, is at once to bring the case within the reason which imposes the necessity of deny-

ing effect to the like gifts of an estate of freehold in land. For that reason, a future or conditional limitation for an estate of freehold, in any incorporeal hereditament already created, is, within the extent of the rules by which cases of limitations of land for an estate of freehold, to commence in future, or on an event, are decided. After the rent has been created, a title may be made to it, and that title will depend on those terms alone, on which the rent was originally granted (*e*); and as, in the instances in which rent, common or any incorporeal hereditament already created, is limited to commence in future, or to cease or be suspended at certain times at which it was not to cease or be suspended by the terms of the original gift; a title may exist to the rent or other incorporeal hereditament during this vacancy of ownership of the freehold; and that title cannot be prosecuted during the cesser or suspension of the estate, such limitation of rent, or common or other incorporeal hereditament already created, is, by a parity of reason, equally void with the like limitation of an estate of freehold in land.

The case of partition (*f*), in which it is agreed, that one parcener, or her heirs, shall have the land from Easter till Lammas, and

(*e*) *Edmonds v. Booth*, as to Tithes, Yelv. 131; *Atkins v. Montague*, as to Dignities, 1 Ch. Cas. 214.

(*f*) 1 Inst. 4 a; 167 b; F. N. B. 61; Salk. 43; Vin. tit. Partition.

that the other parcener or her heirs shall have the same from Lammas till Easter ; or that one parcener or her heirs shall have the land for one year, and the other parcener or her heirs shall have the same for the next year, and so on, *alternis vicibus*, for ever ; or that one of two farms shall be held by one parcener and her heirs for one year, and the other farm be held by the other parcener and her heirs for the like time ; and that they respectively, and their respective heirs, shall, alternately, be entitled to these farms every other year, may be objected as exceptions to the rule.

On a first view, these cases have the appearance of exceptions. In truth, they are not exceptions (*g*). The estate does not vest and re-vest, or cease for a time ; nor is the freehold at any time in abeyance. Each parcener hath an estate which has continuance at all times. The estate, though it may shift in regard to the possession, is permanent in point of duration of interest. An interest of this sort is, by Lord Coke, called a *moveable* estate (*h*).

After partition in this form, neither of the parceners has a particular right to an estate in any particular part of the land, as to the continuance of interest, nor a common right to the whole at all times. Lot meadows are of the same *description*, and so are alternate rights of presentation to churches. Each owner has an

(*g*) 1 Inst. 4 a. 48. 167 b ; *contra*, per *Walmsley*, 1 Rep. 37.

(*h*) 1 Cruise's Digest, 9.

estate which gives to her the right to the possession of a particular part of an entire tenement, or to one of several tenements, at certain stated periods, agreeable to the form of the partition. Her right to the possession, as to the possession, is constantly fluctuating ; her estate is always the same. She has, at all times, a present fixed right of present or future enjoyment.

These observations point to the only grounds on which this case of partition could be decided consistently with principle. This case and the case put by *Walmsley*, of a limitation to one man every Monday, to another every Tuesday, are stated in those points of view in which alone they could possibly be considered ; but it may be questioned, whether there is not that resemblance in the two cases, that the circumstances of the one cannot be distinguished from the circumstances of the other, as far as the circumstances are material to the question of law arising on limitations in this form.

As often as a tenant, *pur autre vie*, died, and no special occupant was appointed, the law cast the freehold on the person, if any, in possession ; or if no person was in possession, then on the person who first entered, claiming the possession. By these means no one could be delayed of a remedy for his right.

Admitting the possession to have been vacant, the person who had a right might restore himself to his estate, at least to the possession of the land, and become tenant of the freehold

by his entry; and if any one was in possession, that person was tenant of the freehold, and liable to have the freehold demanded of him by the rightful owner (*i*).

When the rightful owner became occupant by his entry, then it should seem he was remitted to his right, and he had an estate under his ancient title. The law has preserved the right of entry, as against an occupant; for no descent, even to a special occupant, would toll the entry, and convert the remedy into an action.

The doctrine of the common law, which gave a title by occupancy, proceeded on the principle of preventing the abeyance of the freehold.

Other rules relative to the freehold are,

1. An estate of freehold cannot be confirmed for part of the estate (*k*), while an estate for years may be confirmed for part of the years (*l*).

2. Whoever avoids the first estate of freehold, does, with some exceptions, avoid all remainders expectant on that estate.

3. Whoever confirms, in fact, or by construction of law, a remainder or reversion, does, in effect, confirm the particular estate (*m*).

But there may be a confirmation of the particular estate without a confirmation of the remainders (*n*).

4. An estate of freehold cannot, by the rules

(*i*) 1 Inst. 342 b.

(*k*) 1 Inst. 297.

(*l*) Ibid.

(*m*) Litt. § 521.

(*n*) *Carhampton and Carhampton*, Irish Term Rep. 567.

of the common law, cease for a time, and be *in esse* for a time (*o*).

The doctrine of uses and executory devises has modified this rule.

5. An estate of freehold, after it is created, cannot be defeazanced or subjected to a condition (*p*), by the rules of the common law.

A term of years already created may be defeazanced, and a condition may be annexed to an estate of freehold, by a deed forming part of the same transaction; for, *quæ incontinenti fiunt in esse videntur* (*q*).

Even an estate of freehold may, under the learning of shifting uses, powers, and executory devises, be avoided by a *quasi* condition, or proviso of cesser, or a conditional limitation.

6. Even an interval between the time of determination of the particular estate and the time of commencement of the remainder would render the remainder void (*r*).

This rule does not apply to executory devises or springing uses (*s*).

7. A release of right to a person who has a particular estate, or a remainder or reversion (being an estate of freehold,) will be a release to all persons connected in privity, and holding under the same seisin.

A confirmation does not necessarily produce this effect.

8. A right or title which any man hath to any

(*o*) 1 Inst. 271 b. n. 231; *Rodger's case*, 9 Rep. 104.

(*p*) 1 Inst. 236 b.

(*q*) 3 Abstr. 120.

(*r*) 2 Abstr. 111.

(*s*) 2 Abstr. 111. 113.

lands or tenements of any estate of freehold or inheritance cannot be barred by the acceptance of any collateral satisfaction or recompence (*t*).

This rule relates to the mode by which the property of an estate of this quantity may be transferred, or a right thereto extinguished. It is applicable to the learning on titles, and to alienation and assurances, as a branch of the law on that subject.

There are various other similar rules respecting the freehold, including the rule in *Shelley's* case, to be the subject of the next chapter.

These rules, exclusive of the rule in *Shelley's* case, will be best learned on a perusal of Lord *Coke's* Commentary on Littleton.

Estates of freehold are either,

1. Of inheritance.
2. Not of inheritance.

An estate of inheritance confers the right of continuing the estate, sometimes, as in fee-simples, by a perpetual transmission; and at other times, as in estates-tail, for an interest which may determine; to those whom the law has designed as the successors of the last owner under the appellation of *heirs*, or heirs of the body, in reference to individuals, and of *successors*, in reference to corporate bodies.

Estates of inheritance are either in fee, or in fee-tail; and these estates, in all their varieties, and according to their several species, will be the subject of the fourth and fifth chapters.

(*t*) *Mary Vernon's* case, 4 Rep. 1; *Peyton's* case, 9 Rep. 79.

CHAP. III.

On the Rule in Shelley's Case.

THE subject of this chapter is, professedly, the rule in *Shelley's case* (a).

The end proposed, is, by negative and affirmative propositions, to exhibit, in a discussion of that rule, the instances in which *several limitations*, one to the *ancestor*, the other to the *heirs*—heirs of the *body*—or *issue* of the body of that person, do and do not give the *inheritance* to the ancestor.

This rule is immediately relevant to the doctrine on estates of *freehold* and *inheritance*. Under particular circumstances, it involves, in a material and very interesting point of view, the law on the construction of words of *limitation* in *deeds*, *wills*, and other writings, such as *declarations of uses*, *appointments* in pursuance of powers, &c. The rule may be thus expressed ;

1st, When a person takes an estate of *freehold*, *LEGALLY OR EQUITABLY*, under a *deed*, *will*, or other *writing*, and afterwards, in the *same deed*, *will*, or *writing*, there is a limitation, *by way of remainder*, *with or without* the interposition of any *other estate*, of an interest of the

(a) 1 Rep. 93.

same quality, as **LEGAL OR EQUITABLE**, to his *heirs* generally, or his *heirs* of his body; by that name in deeds or writings of *conveyance*, and by that or some such name in wills, and as a *class or denomination of persons*, to take in *succession* from *generation to generation*; the *limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation*.

Or, 2dly, "Wherever the ancestor takes an estate of freehold, or franktenement, and an immediate remainder is thereon limited, in the **SAME CONVEYANCE**, to his heirs, or heirs in tail, such remainder is *immediately executed in possession*, in the ancestor so taking the freehold, and therefore is not contingent or in abeyance (b)."

Or, 3dly, and still more accurately, "Where the ancestor takes an estate of freehold, by any gift or *conveyance*; and in the same gift or conveyance there is a limitation, either "*mediate or immediate*," to *his heirs*, or *heirs of his body*, the word *heirs* is a word of *limitation of the estate*, and not of purchase (c);" by which it must be understood, that it is not a designation of persons to take *originally* in their own right.

(b) Fearn, 4th edit. 30; 2 Roll. Abr. 417; 1 Rep. 104, *Shelley's case*; 1 Inst. 22 b. 17 b. 376 b.

(c) Fearn, 30. 103; 2 Roll. Abr. 417; 1 Rep. 104, *Shelley's case*; Brook, *Done*, &c. pl. 11; same Name, pl. 1. 40.

The rule has also been expressed, perhaps with still greater precision, though not with equal elegance, by a very able lawyer, to be "in any instrument, if a freehold be limited to the ancestor for life, and the *inheritance* to his heirs, either *mediately* or *immediately*, the first taker takes the whole estate ; if it be limited to the heirs of his body, he takes a fee-tail ; if to his heirs, a fee-simple (*d*)."

In this proposition, the rule assumes the fact to be, that the *inheritance* is limited to the *heirs*, and, therefore, it expresses the legal application of the rule, more clearly than those positions, in which it is stated, generally, that the second limitation is to the heirs ; for the very ground and principle of the rule, is, that the *heirs*, as such, are, in point of *intention*, to have the *inheritance*, *quatenus* they are the *heirs* of the *ancestor* (*e*).

The like observation may be made on the first of these definitions ; and for its accuracy, the writer of this chapter is answerable. In that definition, keeping in view the opinion of Lord *Thurlow*, delivered in *Jones and Morgan* (*f*), it is proposed, that the limitation must be to the heirs, as a *class* or *denomination* of persons to take in *succession*, from generation to generation ; and this is, in legal effect, to state

(*d*) Per Serj. *Glynn*, in *Perrin and Blake*.

(*e*) See *White and Collins*, Com. Rep. 289.

(*f*) 1 Brown's Ch. Ca. 206.

that the *inheritance* must pass to the ancestor, by reason of the limitation to the heirs.

The rule, on being analysed, requires

1st, That there shall be an estate of *freehold*.

2dly, That there shall be a limitation to the *heirs*, or heirs of the body, of the person taking that estate; by that, or some such substituted name (*g*), and not the heirs, as meaning or explained to be, sons, children, &c.

3dly, That these heirs shall be named to take as a *class* or *denomination* of persons (*h*).

4thly, In succession, from generation to generation.

5thly, By way of remainder; or, at least (*i*), so that the estate to arise from the limitation to the *heirs*, and the estate of freehold in the *ancestor*, shall *both* owe their effect to the *SAME DEED*, will, or writing.

And *lastly*, that the several limitations should give interests of the *SAME QUALITY*: both *legal*, or both *equitable*.

Leaving it indifferent,

1st, Whether the limitation to the *heirs* is to give an interest, to take place immediately after the determination of

(*g*) 1 Inst. 26 b.

(*h*) Per Bailey, J. 11 East, 564.

(*i*) *Venables v. Norris*, 7 Term. Rep.

the ancestor's estate of freehold, and consequently connect itself with that estate, and, by *merger* thereof, form one entire interest; or to take place at a remote period; waiting *for*, and continuing expectant *on*, the *determination* of some *other* estate, limited in remainder of the ancestor's estate.

2dly, Whether the limitation to the *heirs* is to give a *vested* or *contingent* interest.

At least, if these are not inferences arising fairly out of the *definition* of the *rule*, they will be found fully warranted by the *cases* from which the rule is to be collected; without any exception to the generality of these deductions, besides the case proposed by Mr. *Fearne*, of an *estate of freehold*, with a *power of appointment to uses*, in *one deed*, and an execution of that power by *another deed*, in favour of the heirs of the person to whom the freehold is limited by *the first deed* (*k*); and also those cases which will be noticed in the sequel, AS NOT WITHIN THE EXTENT of the rule, or, for particular reasons, exempted FROM ITS INFLUENCE, by the interposition of a COURT OF EQUITY.

These conclusions, it must be observed, are deductions from the following parts of this Essay. They are introduced, in this place, to open the scope of the rule at one view, and in an early part of this work, to give the reader a general and comprehensive view of the rule. The author

(*k*) *Fearne*, 99; *Watk. Desc.* 159.

feels abundant reason to make this remark, to excuse himself for having treated the subject without a strict regard to this arrangement. To have examined the rule under this arrangement, would, in all probability, have been the best mode of treating the subject.

For introducing so many definitions of this rule, an apology may also be necessary. One motive to this conduct, was to show the various means, used by various persons, to convey their sense of the scope and application of the rule. Another motive originated in the hope, that the impression to be made by the several definitions, would be more strong, than that which would be communicated by either, singly. It was also thought, that the comparison which must be made of the several definitions, to observe the circumstances under which they exhibit the rule, would be the most certain way to inform the judgment, and, at the same time, assist the memory.

The extent and importance of this rule, the variety of cases which it embraces, the doubts entertained on its extent and application, and the nice distinctions, and numerous exceptions of which it admits, render the consideration of the rule, and its exceptions, a task of great difficulty. An attempt, however, will be made, though with diffidence and doubt of success, to exhibit the rule, in a point of view, sufficient to

awaken the attention of the reader ; to give him an outline of the doctrine ; and to interest his wishes, so far as to raise in him a desire of extending his researches into the elaborate and highly valuable Treatise of Mr. *Fearne*, on *Contingent Remainders* ; from whose judicious Essay on that subject, the greater part of the doctrine on this rule is collected. The persuasion that this *Essay on the Quantity of Estates*, and particularly the chapter on *Freeholds*, would be defective, unless the learning of *this* rule were introduced, is the best apology that can be made for offering, in this chapter, a succinct view of the principles and outlines of which the rule itself is composed. And some hope is formed, that the succinct and collective view, and also the manner and arrangement, in which the rule is exhibited in this Essay, will assist the student in reading the more extended and laborious works of Mr. *Fearne* ; and that this Essay may have its utility, *after THAT book is read*, in calling the detailed and cogent reasons of that gentleman to memory ; serving as a synopsis to his work.

This Essay may also have the effect, and a very desirable one it will be, of *preparing the reader to enter on the laborious works of Mr. Fearne*, with some previous insight into the subject, and with that general knowledge of the application of the rule, and of the exceptions to the same, which will be a means of assisting

the student to see the full force, the reason and the extent of that gentleman's conclusions, and of the cases he has introduced, in elucidation or support of his positions, or on which he has offered his sentiments with so much energy and judgment.

The importance of a thorough knowledge of this rule will be evident, from the consideration, that the power of *alienation* by the ancestor, to a *total* or *partial* exclusion of his *relations*, falling under the denomination of his *heirs*, in the descriptive terms of the limitation which names them, is, very frequently, to be ascertained through the medium, and by the application of this rule.

In those instances to which the rule applies, the ancestor has this power of alienation; for the inheritance is *in him*; and *his children* or other *relations*, so far as their right is founded on the limitation to *his heirs*, can claim only in succession from him, and, therefore, will be bound by his acts; while in those instances to which the rule does not apply, the *children* or other *relations*, falling under the denomination of *heirs*, have a title *originally*, in their *own right*, and as *purchasers* by that *name*; and do not claim through or under their ancestor, further than as persons described by means of his *name*, and as his heirs: in other words, as the persons in whom this character is to be fulfilled, and therefore their ancestor, merely because

he bears that relation to them, cannot, by his alienation, make any disposition to their prejudice.

Before any observations are submitted on the immediate application of the rule, it will be right to premise, that the rule is of positive institution, and has this circumstance of peculiarity and variance from rules of construction. Instead of seeking the *INTENTION* of the parties, and aiming at its accomplishment, it interferes in *some*, at least, if not in *all* cases, with the *presumable*, and, in many instances, *THE EXPRESS* intention. In its very object, the rule was levelled against the views of the parties. Hence has arisen the great difficulty of deciding questions involving the consideration of the rule. To determine whether the operative force of the rule, or rules of construction which take the *intention* of the parties for their guide, shall prevail, is, generally, the point to be decided. It is to be seriously lamented, that a line cannot be drawn so precisely, as to enable a distinction to be clearly taken, discriminating those cases which are, from those cases which are not objects of the rule.

Every case must, in all *instruments*, and especially in *wills*, depend, in a great measure, on its *particular* circumstances.

The question in these cases will always be, which of the two rules, the one in *Shelley's case*, or the one which takes the intention for its guide, shall be applied to determine the legal

effect of the *several* gifts to the *ancestor* and his *heirs*.

In the progress of the observations to be offered in this chapter, an attempt will be made to trace the rule in *Shelley's* case to its principle, and show its force and extent, in the clearest point of view in which it can possibly be exhibited.

To begin with the outlines of the rule: it must be called to remembrance, that in *Perrin and Blake* (1), Lord Mansfield said, "The rule is not a general proposition, subject to no controul, where the intention is on the other side, and where the objections may be answered." And he agreed with Justices *Wilmot* and *Aston*, that "the intention is to govern, and that *Shelley's* case does not constitute a decisive uncontroulable rule."

And Mr. Justice *Buller*, in the well considered opinion he delivered on the case of *Hodgson and Wife v. Ambrose* (m), which involved the discussion of this rule, made this observation; "If a testator makes use of legal phrases or technical words *only*, the Court is bound to understand them in their legal sense, and they have no right or power to say, that the testator did not understand the meaning of the words he has used, or to put upon them a construction different from what has been long received, or what is affixed to them

(1) 4 Burr. 2579; 1 Collectanea Juridica.

(m) Doug. Rep. 337.

by law:—and added the following distinction; —“ But if a testator use *other words*, which *manifestly indicate what* his intention was, and show, *to a demonstration*, that he did not mean what the *technical words import*, in the sense which the *law has imposed* upon them, that intention must prevail, notwithstanding he has used such *technical words* in other parts of the will (n).” —“ That the operation of words must arise from the sense they carry,” was a remark of Lord *Hardwicke's* (o); and “ that sense,” Mr. Justice *Buller* very judiciously observed, “ can only be found by considering the whole will together (p).”

In this place, it will be right to attend to a distinction, which will be a clue for solving all questions of ordinary difficulty; and the point of this distinction is, that the rule extends to those limitations *only*, in which the HEIRS of the person, to whom a *previous estate of freehold is given*, are, by the *manifest intention* of the parties, to take *under that appellation*, in its technical sense, and that appellation embraces *all* the heirs of the *given description*, and the limitation has *these heirs* alone, and no others of a different class, nor the heirs of the heirs as *individuals* (thereby distin-

(n) Doug. Rep. 337; 1 Fonbl. 407; *Dodson v. Hay*, 3 Bro. Ch. Ca. 408.

(o) In *Bagshaw and Spenser*, 2 Atk: 583.

(p) In *Hedgson and Ambrose*.

guishing between the heirs of the *ancestor*, and the heirs of the *heirs*) for its *object*: and it extends to cases of this description, *as often as these heirs are, immediately after the decease of their ancestor, to be entitled in the same manner, and to the same extent of interest, and to an estate exactly with the same* DESCENDIBLE QUALITIES, as they would take from their ancestor, if the limitation was at that point, and in that order of the gifts which names the heirs, to him and his heirs, &c. even though it be the intention of the parties, that these heirs shall take BY PURCHASE, and not by descent, and that the estate of the ancestor shall not, in any event, be *enlarged* by the gift to his heirs: for, as in several sentences, connected in sense though detached in expression, it was emphatically said by Lord *Thurlow* (*q*), in declaring his sense of the application of this rule, "where the *heir* takes in the *character* of *heir*, he must take in *quality* of *heir*."—"By all the cases where the estate is so given, that after the limitation to the first taker, it is to go to every person who can claim as heir to the *first taker*, the word *heirs* is a word of *limitation*." And again, "all heirs taking as heirs, must take by *descent*."

This is the principle, the leading object, and characteristic feature of the rule; and the reader will perceive that it is confined to those in-

(*q*) *Jones and Morgan*, 1 *Brown*, Ch. Ca. 216.

stances in which the several limitations have this view, and are merely of this description: for, as has been already noticed (*r*), *the rule is not so strict, as to controul the manifest intention, if that intention steers clear of the reason of the rule, or of its literal terms.*

The most strenuous advocates for a proper and legal application of the rule, must admit, that the intention is to be collected, and if clearly expressed, to be observed.

After the intention is fixed, the law decides on the gift; allowing the intention to govern, as *often as it is clear* that the word *heirs* is not used, as descriptive of the *class* of legal *successors*; but in *designation* of an *individual*, or of *particular* persons (*s*).

The intention to be observed, in exclusion of this rule, must be expressed in *terms*, manifestly exhibiting to the mind, clear evidence that the heirs are not to take merely in that *right*, and as answering that description. The inquiry must be directed, to discover the intention, and to see whether the gift is clear of the reasons on which the rule depends for effect: for as Lord *Hale* very pertinently observed, in *King and Melling* (*t*), in reference to wills, the *intention* is to be *law* to expound the testament. "The true ground of decision is the intent, and the true question is, *what is the intent?* and the

(*r*) P. 272; 1 Fonbl. 407.

(*s*) Watk. Desc. 170.

(*t*) 1 Vent. 214. 225; 2 Lev. 59.

interpretation is to *show the intent*." And as Mr. Justice Buller (u), with *still greater perspicuity* and precision, observed, in a case involving the construction of a will, "There is no rule better established, than that the intention of a testator, *expressed* in his will, *if consistent with the rules of law*, shall prevail."—"That is the first and great rule in the exposition of all wills; and it is a rule to which all others must bend. It says, '*if consistent with the rules of law*;' but it must be remembered that these words are applicable only to the *nature* and *operation* of the *estate* or *interest* devised, and not to the *construction of the words*. The question whether the intent be consistent with the rules of law or not, can never arise, *till it is settled what the intention was*. This can only be discovered by taking the whole together. If it be apparent, I know of no case that says a strict legal construction or a technical sense of *any words whatever*, shall prevail against it, unless a case (x) which made a great noise in Westminster Hall a few years ago, be considered as such. If the intent does not *plainly appear*, I agree that the legal sense of the words must prevail." Applying his observations to the case of *Hodgson and Ambrose* then before the Court of *King's Bench* for their opinion on the effect of a *devise*, which, to state the same

(u) In *Hodgson and Ambrose*.

(x) *Perrin and Blake*.

briefly, was "to the use and behoof of C and her assigns, for and during the term of her *natural life*, and from and after the determination of that estate, to the use of *trustees* thereinbefore named, and their heirs, *during the life* of the said C, upon trust, to support and preserve the *contingent uses* and estates thereafter limited, from being defeated, or destroyed; and for that purpose to make entries and bring actions as the case should require, but nevertheless to permit and suffer the said C and her assigns during her life, to receive and take the rents, issues and profits to and for her and their own use and benefit; and from and after her decease, then to the use and behoof of the *heirs of the body of the said C lawfully issuing*;" and observing, that if there had been no devise to trustees, the case would be so plain that no man could doubt about it, he propounded this question, "What then is the nature of such devise to support *contingent remainders*?" and he answered the question, saying, "it is a legal and technical limitation, the peculiar language of conveyancers;"—and continued to observe,—"the effect of this sort of limitation in a deed, is settled. There it is not sufficient to turn *words of descent* into *words of purchase* (y). The testatrix has not shown, by any *other words*, that she meant to use the technical expressions in a

(y) At this day, this concession would be deemed a ground for the application of the rule, even to gifts in a will.

different sense from what the law has put upon them, and, therefore, the *legal sense* must prevail."—"It seems to me to be false logic, to put a different sense on any words from what *in general* they import to bear, by *mere inference* from the *words* themselves, *unexplained* by any *others*: though if other words manifest the intent, I know of no law that says the intent shall not prevail."

In weighing the force and application of this rule, the proper inquiries in doubtful cases, in order to the exposition of words of limitation to the heirs, or heirs of the body, &c. are,

1st, Whether these words are used to comprehend *all* the persons who shall *successively* answer the description, and consequently shall be words of *limitation*, to enlarge the ancestor's estate; or are words of *purchase*; that is, words describing *particular* persons as *individuals*, to take in their *own right*?

2dly, What is the legal import of these words, considered as words of *purchase*? and,

3dly, Whether the intention is *manifestly clear*, that the words shall have the *partial effect* of describing *particular* persons, rather than, and in direct exclusion of the construction which would be affixed to them, by allowing them to be affected by this rule; under *which* they will be held to extend, to *ANY heirs* of the

given description, *collectively*, as a *class* of persons: *since unless there be such direct intention, plainly and clearly expressed, the rule must take place?*

Still the difficulty exists, of ascertaining those words and expressions which are sufficient to indicate such direct intention; and this is a difficulty which will continually occur in practice.

It is not sufficient, that the intention should depend on inference or presumable reasons: it must be manifested by words which are explicit; by words which, without any infringement of the rule in Shelley's case, at least the reason and spirit of that rule, if not its literal terms, may be construed to be a designation of particular persons.

The difficulty, when it arises, does not, in any degree, question the existence of the rule; it merely raises a doubt on the application of the rule.

To obviate this difficulty in some degree, and to elucidate and enforce the observations which have been submitted to the reader, it will not be foreign to the purpose of this Essay, to review, in detail, the effect of a limitation to the *heirs* or *heirs of the body* of an individual, when the persons who shall sustain this character are to be "*purchasers*" under that name, in its most comprehensive terms.

In case the limitation is to the *heirs generally*, the person who answers that description, at the

time when the limitation is made (*y*), otherwise the person who shall *first* answer the description will have a fee; whether descendible to him and his heirs generally, or with a restriction to those heirs who are of the *blood* of his *ancestor* (*z*), in those instances in which the limitation is to the *right heirs* of a *man*, is not clearly ascertained; nor is it in anywise material to the point under consideration. Of the extent and descendible qualities of the estate which passes by a limitation in these words, some notice will be taken in the chapter on Fees.

The observations on a limitation to the right heirs of a person, as purchasers, are equally applicable to a limitation to his heirs of his body, as purchasers, with this distinction; though the limitation will vest *all the estate* imported by these words, in the person who *first* fulfils the character of *heir*, according to the terms of the gift, yet it does not exclude those persons, who, by any possible event, may, at a future period, bring themselves within the same description (*a*).

All persons *successively* answering that description, may take under this gift. They are within the terms, and therefore may derive the benefit, of the gift. The estate vests *wholly* in the *FIRST* taker with a *descendible*, or, more accurately speaking, a *transmissible* quality, which will admit all successive *heirs* of the

(*y*) *Cholmondeley v. Clinton*, 2 Mer. 173. (*z*) Litt. § 354.

(*a*) *Mandeville's case*, 1 Inst. 26 b; *Wills and al. v. Palmer*, 5 Burr. 2615; 2 Bl. Rep. 687; *Southcot v. Stowell*, 2 Mod. 207, 211.

body of the given person, though related to the *first taker only* in the *collateral line*, into the measure and extent of this estate. So complete an owner of *all* the estate, is each successive taker, that he may defeat the right of every other person falling within the terms of the gift. All the *heirs* OF THE BODY of the person to whose heirs the limitation is made, take, in point of estate, precisely in the same manner, and with the same degree of interest, and in the same relative situation, as if the estate *had vested* in their ancestor, under a gift to him and his heirs of the given description. The heirs succeeding from time to time, *collaterally* to the *first taker*, do not take by way of *remainder*; nor does the person in whom the character of heir is *first* fulfilled, take the same limited degree of interest, as if the *gift had been to him and his heirs of his body*. His *brothers* and *sisters* are within the extent of the gift, and they may take in succession, and may be barred by his fine with proclamations (*b*). Neither do they take separate and *distinct estates*. Their only ground of claim is, that the measure of the estate does, in its comprehensive terms, embrace persons of their description, and confer a right on them, as heirs within the compass of the entail. Strictly speaking, they do not take by *descent*; for they do not claim as heirs to the person, in whom the estate *first vests*. He is not *their* ANCESTOR; nor can they, with any precision, be said to take

(b) Mob. 258; Co. Litt. 372 a b.

by *purchase*; for then they would take separate and *distinct estates* (c). They take in a *mixed right*: in a right which cannot be easily defined; by a *quodam modo descent*; a descent *per formam doni* under the statute of intails (d) (e).

When a gift to *heirs or heirs of the body taken separately*, would confer an interest of this nature, then the rule will apply to a gift connected with an estate of freehold in the ancestor. This position seems to be so clearly maintainable, that every case of this description necessarily invites the application of the rule.

From these deductions it will appear, that the *previous inquiry* must be, what is the true construction of the limitation to the heirs, or heirs of the body, considered distinct from the freehold in the ancestor. Does it describe all *possible heirs* of the given description; so that it is not confined to *one* person, or to several persons, in whom the character of heirs shall be first fulfilled; or does it by these words, independently of words of superadded limitation, extend to the issue, or the *issue* and other relations of these persons; is the material point to be discovered.

The rule in *Shelley's* case will be applicable or not, according to the result of this inquiry.

That *all possible* heirs of the given description are to take in succession, from generation to generation, under the name of *heirs of the an-*

(c) Watk. Desc. p. 3, note (a).

(d) Ib. 156.

(e) Butler's Fearn, 80.

cestor, is to bring the case immediately within the rule. That *only one* individual, or several individuals, is or are to take, in the character of heirs, or rather as *particular* persons described by that name, either for their *lives only* (f), or for an estate of inheritance to be deduced from them as the stock or ancestor ; and that their heirs are described by superadded words of limitation and as their descendants, is to exclude the rule.

The intention that the heirs should or should not take by purchase, ought not to form any part of this preliminary inquiry (g). The single point to be decided is, in what manner THEY ARE TO TAKE ; generally, without exception, as a class of inheritable persons, and as the successive heirs of the person to whom the preceding estate of FREEHOLD IS LIMITED ; or partially, as individuals selected out of the class of heirs, and for an estate which, so far as it depends on the gift to the heirs, because they, as heirs, &c. of their ancestor, are the donees, will determine with their deaths ; and so far as it is of an inheritable quality, will entitle those heirs only, who, deducing their pedigree from these individuals are to look up to them as their common stock, from whom their descent is to be derived, in like manner as if the parent or ancestor of these individuals had been named as the donee.

(f) *White and Collins*, Com. Rep. 259.

(g) *Sed vide Doe v. Ironmonger*, 3 East, 533 ; 7 Term, Rep. 532.

It is on these grounds that the decision of the case of *Perrin and Blake* (*h*), in the Exchequer Chamber, is more satisfactory than the judgment pronounced in the Court of King's Bench, on the same case.

In that case, the devise, so far as it is material, was made by Mr. *Williams*, in these words ; " Should my wife be *enseint* with child, at any time HEREAFTER, and it be a female, I give and bequeath unto her the sum of 2,000*l.* &c. : and if it be a *male*, I give and bequeath my estate, real and personal, equally to be divided between the said infant and my son *John Williams*, when the said infant shall attain the age of twenty-one. *Item*, it is my intent and meaning, that *none of my children shall sell or dispose of my estate for longer time than his life ; and to that intent* I give, devise and bequeath all the rest and residue of my estate *to my son John Williams* and the said infant, for and during the *term of their natural lives* : the remainder to my brother-in-law *J G* and his heirs, for and during the lives of my son *John Williams* and the said infant, the remainder to *the heirs of the body of my said son John Williams* and the said infant *lawfully begotten or to be begotten*, the remainder to my *daughters*," &c.

It is by observing on this case, that the rule may be brought to the test, and illustrated.

That this case did or did not call for the

(*h*) 4 Burr. 2579; 1 Black. Rep. 672; 1 Collectanea Juridica, 283; MS. Rep.

application of the rule, was a point, *on which a great diversity of opinion was entertained*. Men of the first eminence differed in their sentiments on the construction of this will. In the Exchequer Chamber it was held by a majority of the judges, that the rule *did* APPLY TO THIS CASE; and the judgment of the Court of King's Bench, founded and pronounced on the opinions of Lord *Mansfield* and Justices *Willes* and *Aston*, against the opinion of Justice *Yates*, who argued very ably and strenuously for the application of the rule, was reversed.

Trying the solution of the law on this will, by the modes of inquiry which have been recommended for ascertaining the application of the rule in doubtful cases, *it is clear that the case of Perrin and Blake was completely within the reason and the terms of the rule*; without any circumstance (besides the intention of the testator, as collected from the express estate for life, and the limitation to support contingent remainders, that the heirs should take *distinctly* from their ancestor,) to show that the testator did not use these words as words of *limitation*, that is, as comprehending the *whole class* of heirs. This intention, so far from negating the application of the rule, is the very ground and reason from which it had its origin.

It was clear that the testator intended that the *successive heirs of his son*, and not merely one or more individuals in particular, should be

entitled under the limitation to *the heirs of his body*.

He might have intended, and *most probably* he did mean, that *the first and other sons should take successively in their own right*, apart from their ancestor, an estate transmissible from them to their heirs in tail. But to the words he used, in the general and unqualified manner in which they were introduced, the law has not appropriated any such meaning, and therefore, it could not affix to them any such sense.

The words heirs of the body, unexplained by any *adjunct* or *declaration* (*i*), or context (*k*), will not, in a court of law, admit of this interpretation.

Even in a case (*l*) in which words pointing to a *succession* of the heirs according to *seniority*, and by way of *remainder*, and other words of a corresponding and still stronger import were used, it was determined that they were not sufficient to turn the words heirs, &c. into words of purchase, descriptive of the *first* and other *sons*, as *distinct* persons, unconnected with, and independent of their character of *heirs*.

Several cases of the like description will be introduced, in examining the exceptions to the rule.

To make the words heirs, &c. words of pur-

(*i*) See *Hodgson & Ambrose, supra*, 14; Dougl. Rep. 337.

(*k*) *Doe v. Ironmonger*, 3 East, 533.

(*l*) *Legate v. Sewell*, 1 P. W. 87; 1 Eq. Abr. 394.

chase, the words must, by some context, appear to be used in a restricted and qualified sense, and not as descriptive of the heirs of the body, in the technical sense of the phrase (*m*).

In *Perrin and Blake*, to have given each respective son, according to his seniority, an estate-tail, so that each several son might have a vested estate at the same time, one *in possession*, the others in *remainder*, would have been to annex to the words heirs of the body, a sense of which they do not admit in a court of law. No court, regulating its decisions by the strict rules of the *common law*, has ever yet gone so far as to put such a liberal construction on these words, standing alone, undefined and unexplained, as to determine that they shall give *several* and *distinct* estates to *distinct* persons, *when these persons all come under the same denomination, and are described by a general term, as a collective class of persons*.

The cases of *Mandeville* (*n*), and *Willes* and *Palmer* (*o*), go the length to negative this construction, by showing that the law will give *all the estate* or degree of interest imported by these words, *to the first taker*; even in those instances in which the heirs are *unquestionably* to be entitled as *purchasers* by that name of designation, and that name embraces other persons who may successively answer the descriptive terms of the gift to the heirs. Indeed,

(*m*) *Doe v. Ironmonger*, 3 East, 533.

(*n*) 1 Inst. 26 b.

(*o*) 5 Burr. 2615; 2 Bl. Rep. 687.

to have determined that any individual, or the person in whom the character of heir should be first fulfilled, *would take exclusively of all the other persons who might answer the description*, and that the gift should be confined to that person and his heirs of his body, would have been to abridge the gift, to the prejudice of other persons who *were clearly and EQUALLY objects of the gift*.

For these reasons it seems agreeable to first principles and every rule of law and of construction, to conclude, that the heirs were intended to take as a *class or denomination* of persons, and not as *individuals* particularly selected out of that class or *denomination*; and since, under the will which gave rise to the question in *Perrin and Blake*, they were to take in this manner, and their ancestor had a preceding estate of freehold, there was not any well-founded reason to contend, that this estate of freehold did not confer on the donee for life the benefit of the limitation to the heirs of his body.

In the construction of *articles* for a *marriage settlement*, the *Court of Chancery*, exercising its *equitable jurisdiction* to correct the manifest *errors of the parties*, does, in some cases, construe a limitation to the *heirs of the body* to give an *equitable interest IN TAIL* to the *first and other sons*. But this practice furnishes *no argument for a similar construction of these words in a court of LAW*. The Court of Chancery itself allows that the *legal and proper effect* of these

words is, that which results from the conclusions to be drawn from the rule in *Shelley's case*; and even admits the necessity of *changing the words*, in order to give to the *intention* that effect at law, which is agreeable to its own *equitable interpretation*; or rather its *inference* from the nature of the transaction.

The doctrine is equally applicable to limitations of the *legal estate*, *limitations of use*, and *limitations of trust*: and extends as well to *copyhold (p)* as to *freehold lands and tenements*; and even to lands, &c. held for a life or lives, and subject to a *quasi* entail; &c.

The doctrine of the rule extends to all sorts of instruments by which gifts or limitations of estate can be made, either at law or in equity, including limitations in surrenders of copyhold lands.

Still, however, there may be a difference of construction of the language of the limitation, according to the nature of the instrument, as a perfect deed, or will, and imperfect articles, into which the limitations may be introduced; and also on account of the object and tendency of the provisions in these instruments, and the nature of the interests they confer.

It will be right also to premise, that in those cases in which the owner of an estate, either *freehold or copyhold*, limits the *ultimate interest* (being the fee) to *his right heirs*, by way of *use*; in the case of *freehold* lands, either on a *copy-*

ance or declaration of uses (*q*) ; and in the case of copyhold lands on a surrender to uses (*r*), *he* has the *fee*, as his *old reversion* ; and as to this point, so far as relates to *freehold lands*, it does not make any difference, whether an estate of freehold is limited to *his use*, or an estate of freehold is limited to *the use* of any other person, expressly for the exact period of his, the grantor's, life, or he has an estate *for years* by express limitation. A limitation to the USE of HIS *heirs of his body*, is not affected by these observations ; for unless the author of the uses takes a preceding estate of freehold by limitation, or resulting use, his heirs of this description will, under a limitation to them, take *by PURCHASE* (*s*).

When the limitation is to the heirs of the body, then, if the ancestor take a preceding estate of freehold, the *rule*, which is the subject of this chapter, will be applicable to the several gifts, and HIS heirs of his body cannot be entitled, otherwise than by descent from him.

Since a man cannot devise an estate to himself, no limitation in *his will* to his *heirs* or *heirs of his body*, can become the subject of the rule, for want of an estate of freehold in the ancestor ; and *in deeds* operating *solely by conveyance at common law*, a man cannot, with effect, limit any

(*q*) *Fenwick and Miford*, Moor, 284 ; 1 Leon. 82 ; 1 Inst. 22 b ; 1 Rep. 100 ; *Reade and Morpeth*, Cro. Eliz. 321 ; Sir *T. Tippen's* case, 1 P.W. 359 ; *Earl of Bedford's* case, Moor, 718 ; Poph. 3.

(*r*) *Roe v. Griffiths*, 4 Burr. 1952 ; *Thrustout ex dem. Gower v. Cunningham*, Fearn, 90 ; 2 Black. Rep. 1046.

(*s*) *Else v. Osborne*, 1 P.W. 387.

estate to himself, or to *his heirs, or heirs* of his body, *as such*, and under that *appellation* (t).

Nor does the rule extend to those cases in which the gift is to the right heirs of another person than the grantor or donor; though the grantor be the heir of that person (u).

The grant may be void as far as it is in favour of the heirs, because the grantor cannot make himself or his *heir, eo nomine*, a purchaser by his own grant (x).

For no man can, by the rules of the common law, grant to himself or to his heirs, *eo nomine*, since they are considered as part of himself. At that point, the reason of the rule ceases to operate: and it does not extend to conveyances to uses, or on trusts, or devises by will; thus, heirs of the body of a man, may, by his gift, to or in trust for them, be purchasers. That his general heir would not be a purchaser, *eo nomine*, under a conveyance to uses, flows from rules of equity, embodied into the law, by the Statute of Uses.

That his heirs take by descent, when there is a gift to them by will, flows from the rules of law; that the descent operates before the devise; that the title by descent is the better title. The real ground was, that in times of feudality, it was for the advantage of the lord that the heir should take by descent, that the lord might be entitled to the fruits of seignior, &c.

(t) 1 Inst. 22 b; Bac. Abr. Remainder C.; 2 R. A. 415, D.

(u) Litt. § 30. 353.

(x) 1 Inst. 26 b.

In wills, a devise by a man to *his heirs of his body*, will create an intail, in favour of those persons, as *purchasers* (*y*), who are within the descriptive terms of the devise, and be descendible in the manner already noticed; and a devise by a man to *his right heirs*, by that name, with an intention that they should have the fee by purchase, is VOID; AND THEY WILL HAVE THE REVERSION BY DESCENT, AS HIS HEIRS, without any regard to the rule treated of in this chapter.

To the generality of the position, that a man cannot make himself, or his heirs by that name, *purchasers*, by a limitation in a conveyance at the common law, the validity and effect of a limitation to him, in a fine *sur grant et render* (*z*), has the semblance of an exception. It is clear, that the *render* of a fine of this sort, may give an estate to the granting party, or to his heirs as *purchasers* by that name. Though in point of fact, the fine, collectively considered, is the conveyance of the person with whom the grant in the fine originates; yet, in legal intendment, the person who makes the *render* is considered as the author of the estates limited back to the original owner, or to other persons (*a*). The instrument is considered as a *double conveyance*; as a *grant* and *reconveyance* made by several and distinct instruments. This case

(*y*) *Wills v. Palmer*, 2 Black. Rep. 687.

(*z*) Watk. on Desc. 185.

(*a*) *Ib.* 181.

is therefore neither within the terms or the scope of the rule.

It was thought proper to notice this case, that no confusion might arise, from the impression which it might have made, before it had been sufficiently weighed, and the reason which occasions the difference had been considered.

It is also to be observed, that when the words 'right heirs, or heirs of the body, *connected with an estate of freehold in the ancestor*, are used in deeds or wills, to describe a class or *denomination* of persons, and when, under the rule now in discussion, that gift might have given the interest to the ancestor, the limitation to the heirs or heirs of the body will fail of effect, unless, at the testator's death, *the ancestor be living to take the interest*; for the heirs *cannot*, under a gift designating them as successors, take by *purchase*, though their ancestor never, by reason of his death, was in a situation to take the freehold, and though the heirs would have been entitled as *purchasers*, if their *ancestor* had not been named to take a prior estate (*b*), so as to bring the gift to the heirs within the influence of the rule.

It is also to be understood, that there are some cases falling within the *literal terms* of the rule, which are not within its extent and application. These cases will be noticed, in the sequel of these observations, as forming excep-

(*b*) *Brett v. Rigden*, Plowd. 340; *Hodgson v. Ambrose*, Dougl. 537.

tions to the rule. They comprehend those limitations in *deeds*, *wills*, and other *writings* in which the word heir or heirs, or words heirs of the body, &c. are used and *explained*, in a sense rendering them words of purchase, and of the same import; in some instances, as the *first* and other *sons*, &c. or a *particular son* of the ancestor, and *his* or their heirs of his or their bodies; and in other instances, of *all* the *children* of the ancestor, and the heirs of the bodies of these children, in lineal *succession* from *them*, according to the rules of descent; and in other instances, as a particular *person*, distinguished at present by a title or description, which he answers and fulfils, according to a vulgar, though not the technical, sense of the term. They also comprehend those limitations in *marriage articles*, in which, from the nature of the provision, the parties must have meant that the *first* and *other sons*, &c. should take by *purchase*, since they have otherwise entered into an agreement, which, *so far as relates to the heirs*, cannot give any certain advantage to them.

And it must also be understood, that the word *ISSUE*, used in wills in the *same sense*, and as a substituted term for heirs of the body, is governed by rules of interpretation rather than by the rule under examination.

As to those cases in which, in the construction of *wills*, it has been held, that an estate of inheritance has passed under limitations to *issue*, *sons* or *children*; in these terms, when the ancestor

takes a preceding estate of freehold, they are to be referred, some to the *third*, others to the *fourth* rule proposed for the interpretation of wills, in that chapter of this Essay which treats of Estates-tail.

It is the estate of FREEHOLD, which, with the exceptions already noticed, and to be observed on in the sequel, *attracts to the ancestor the estate IMPORTED BY THE LIMITATION TO HIS HEIRS.*

The rule is, by some writers, deemed to be of feodal origin (*c*), or to be accounted for only on the principles of that system of tenures, and the consequential fruits of seignior.

This was the opinion of Justices *Aston, Willes*, and *Yates*, delivered in *Perrin and Blake* (*d*): the first of whom said, "The maxim itself grew with feodal policy;" the second, that "It was an old rule of feodal policy;" and the third, that "The rule had its origin in feodal policy, and grew up in days when the law favoured *descents as much as possible.*"

After *wardships, reliefs*, and other incidents of tenure flowing from estates of inheritance, were introduced into this system, it was accounted a fraud on the lord, who was entitled to these fruits and incidents on the death of his tenant, and the succession of the heir, that there should be a power to give the property to the ancestor for his life only, and of extending the

(*c*) 4 Bac. Abr. 301.

(*d*) *Collectanea Juridica*, 298. 305. 312. and MS. Rep.

enjoyment to his *heirs*, *quatenus* they were his heirs: so that the heirs should be entitled *precisely* in the SAME MANNER as if they took by *hereditary succession*, and yet take as PURCHASERS in their own right, and, as a consequence, defeat the lord of the fruits to which he would have been entitled on a succession from the ancestor.

On this account, and with great reason, this rule is supposed to have been framed, in order to give the inheritance to the ancestor, so that the *heirs might take by hereditary succession*, in a COURSE OF DESCENT; and so that the lord might have the fruits of his seignior.

In truth, the statute (*e*) enacted for annulling feoffments, made *fraudulently*, to those who *must* be the heirs of the feoffor, to defeat the lord of his wardship, is a *legislative* provision, levelled against the same sort of injury: and so is the rule (*f*) that a man cannot, by his own gift, make his heirs, or heirs of his body, purchasers by that name. In those days of feudalism, WARDSHIP was the most VALUABLE FRUIT arising to the lord from his seignior. The *king*, in particular, was materially interested to prevent all unfair means of depriving lords of this incident of tenure, and they could be deprived *only* by the tenants introducing *the HEIR AS TENANT TO THE LORD BY PURCHASE*, instead of suffering him to be entitled BY DESCENT. The statute which has been mentioned, provided against the practice of conveyances by fathers to their

(*e*) 52 Hen. III. c. 6.

(*f*) 1 Inst. 26 b.

ELDEST SONS : and, probably, to elude the statute in that particular case ; and in other cases, as between persons becoming purchasers and their *heirs* ; feoffments and conveyances were made, under which the father or purchaser would take an estate for life, with a *remainder* to his *heirs* : and the courts of justice, perceiving the frauds committed against lords by this practice, which, if indulged, would have totally deprived the lords of their right to *wardship*, gave that effect to the *several limitations* which they receive at this day.

It is evident, from the statute which has been cited, that tenants made a general practice of devising means to deprive the lord of his wardship, and that the legislature was anxious to afford *relief* TO THE LORD. It may, therefore, very fairly be concluded, that one of the means devised for the purpose of defrauding the lord, was to make the conveyance to the ancestor and his heirs, by SEVERAL LIMITATIONS, with an intent that the heirs should be *purchasers* ; and that the courts of justice, acting on the spirit of this statute, or perhaps on some ordinance which then had the force of law, applied to the several limitations that rule, under which it is, AT THIS DAY, *held that the limitation to the heirs gives the inheritance to the ancestor*.

At least, without such judicial interposition, the provisions of this statute might have been easily eluded.

Other writers (*g*) have been of opinion, that the rule owes its existence to the relation between the *heir* and the *ancestor*, and the genuine construction of the law. They contend, that the law esteems a limitation to a man and his *heirs*, or *heirs of his body*, by *several* and *distinct* clauses, and even with a division of *the time* or *interest*, to pass by these clauses, to be of the same nature, import and extent, as a limitation to a man and his heirs, or heirs of his body, by one connected clause of gift; with the difference only, that when the limitations are several and distinct, and estates are substituted INTERMEDIATELY, the intermediate estates must have priority, according to the order of their limitation.

Thus Chief Baron *Gilbert*, in accounting for the cases falling under the rule, among other conjectures, refers "their principle to the conformity or parity of reason," that several limitations, one to the ancestor, the other to his heirs, "bear to a limitation to *A* and his heirs, or heirs *male* or *female* of his body;" and reasons thus: "As the one gives an estate for *life* by implication *and more*, so the other gives the same in express words *and more*; and *expressio eorum quæ tacite insunt nihil operatur*. And the interposition of another estate between them, only *breaks the order* of the limitation, not THE OPERATION of the words: which being the

(*g*) Moor, 720; Fearn, 113, cites Ch. Baron *Gilbert's* MSS.

same in both cases, ought to have the same operation and construction."

To this effect also are the observations of Mr. *Fearne* (i), who says, in one passage, "In truth, the only substantial difference between a limitation to *A* and his heirs; and a limitation to him for life, remainder to *B* in tail, remainder to the *right heirs of A*; appears to be, that in the first instance, *A* takes the *entire estate in fee*, and, in the other case, he takes it *DIVIDED BY*, and *subject to, the estate-tail in B*. The words *his heirs*, in either case, operate equally as words of *LIMITATION*, viz. words giving the estate imported by them, *not originally* to the *express objects of the description*, but extending the ancestor's estate, *immediately* in the one case, and *mediately* in the other, to them *by DESCENT*, and limiting the ultimate bounds of the estate which he is to take."—In another passage (k), the same author observes, "If we consider the freehold, what in truth it is, a portion of the inheritance, the rule says no more than that you *shall not apportion and divide the inheritance between the ancestor and a line of successors, claiming* under a denomination belonging to them only as his representatives, to an inheritable estate, derived from or under him."

With great submission, these observations are conclusions, drawn from the *DETERMINATIONS* on the rule, rather than resulting from

(i) Page 106.

(k) Page 309.

any general principle of law. They are the *effect* of the rule, not the construction of the gift. In a general point of view, the intention does not require *this interpretation*; but the rule adapted to *these particular* cases determines that the several gifts shall receive it.

Since the distinction between estates for life and in fee was already marked, and it was a settled point that the *owner OF A FEE MIGHT*, (at least with the consent of his lord) dispose of his estate to the exclusion of his heirs, *not being his issue in tail*, it is highly improbable that the fee would have been conveyed to him by the circuitous terms of several gifts, one to him for his *natural life*, the other, *after his decease*, to his heirs. These expressions tend strongly to manifest an intention that the ancestor should not have any greater interest than for his life, and that, after his decease, his heirs should be entitled in their own right; and if such be the apparent object, what rule of *construction* denies effect to the accomplishment of that intention? To defeat the intention, it was necessary to introduce a *negative* rule; a rule, which for some reason of policy, should contravene this intention: and of this description may the rule in *Shelley's* case be very properly considered.

By way of caution to the young conveyancer, it will not be superfluous to observe, since the practice does not appear to have been generally adopted, that a certain mode to avoid any question on the rule, indeed to preclude all doubt,

when he *intentionally* uses the word heirs as a word of limitation, is to make the gift to the *person*, and his *heirs*, or heirs of his body, by one clause, even though there be a previous gift to the ancestor of an estate of freehold.

In this mode of limitation there is not any absurdity in law, though there may be an apparent incongruity in terms; for there cannot be any impropriety in making the second gift, as well as the first gift, to the *person* himself, since the law concludes that a man, who has an estate for life, or an estate-tail, may also have another remote interest; for example, the fee; or an estate-tail, when he takes only an estate for life under the former gift; or a more *enlarged* estate-tail, in those instances in which he takes a previous and *special* estate of that denomination.

To introduce the word *heirs* into any instrument as a word of PURCHASE, except in a gift to the right heirs as such, is always improper, because that word has an *equivocal*, and, used in this manner, only a *constructive* meaning. *There are words of DEFINITE MEANING, which leave no room for the aid of rules of construction, and which ascertain the objects of description so precisely, that no question can be raised on the intention they are to express. Hence the advantage of an intimate acquaintance with the law of assurances, and the legal import of words, since an extensive knowledge of the law on this subject, enables the practitioner to defy*

either the sophistry of argument, or the power which leaves courts of justice at liberty to decide on doubtful questions, in their discretion; a discretion, which, though exercised with a well-meant regard to the intention of the parties, often defeats that intention (k). In short, the art of the conveyancer is properly exercised, and his skill and knowledge, as well as his caution and regard to the interest of his client, most judiciously displayed, by the use, in those instances in which it is in his power to introduce them, of words and phrases of a fixed and acknowledged import. In those instances in which words of this description cannot be found, he should add such explanatory declarations as clearly express the intention, and consequently do not leave any room for discretionary construction.

Leaving it to the diligence of the student to satisfy himself of the policy which originally gave rise to, or called for, the adoption of the rule, it may be assumed, as a certain and incontrovertible position, warranted, in its fullest extent, by practical observation, that the object of the rule is to give to the ancestor, *taking an estate of freehold*, the benefit of that estate which is imported by the limitation to his heirs, so as to confer on him the ownership of that estate, and make it descendible *from him to his* heirs, in the regular line of succession; precisely in the same manner as if the limitation to *his* heirs, was to *him and his* heirs, &c. Since this

(k) *Cholmondeley v. Clinton*, 2 Mer. 173.

is the construction of the law on the several limitations, it must be allowed that there will not be any impropriety, much less any absurdity, in following the advice which has been offered, to give the estate, by the second clause, to the *ancestor* and *his heirs of his body*, instead of making the gift to *the heirs of the body*, without taking any notice of the ancestor.

That the object of the rule was such as has been represented, is clear from the cases to which it is at this day applied ; and it is from its application alone, that any conclusions can now be drawn to the reason of the rule.

The reports of the old cases are silent on the reason of the rule, and leave it open for conjecture. Till the case of *Shelley*, or *Mosley v. Shelley* (1), received its decision, very few cases had invited, or at least involved, a solemn discussion of the rule ; and when that case first arose, the rule does not appear to have been understood or acknowledged as a general and universal position, perfectly settled and received as an *axiom* of law.

The opinions advanced by the gentlemen who argued that case, and who were of the most distinguished abilities, and, afterwards, filled the highest seats of judicature in different departments, render this observation evident.

The cases cited in Lord *Coke's* Report, as those by which the rule was proved, are all taken from the *Year-Books* in the time of

(1) 1 Rep. 88.

Edw. III. Of these cases, that of the *Provost of Beverley (m)*, which was before the court in the fortieth year of that reign, is the most modern. It arose on a fine *sur grant et render*, by which lands were settled on *John Sutton* the granting party in the fine, for his life, remainder, after his death, to *John* his son, and to *Eline* his wife, and the heirs of their bodies begotten; and, for default of such issue, remainder to the right heirs of *John* the father: *John* the father and *John* the son were dead, and *Eline* was also dead, and there was not any issue of herself and *John* her husband. *Richard*, another son of *John* the father, entered, claiming as a purchaser under the gift to the right heirs of his father. The effect of this gift came in question, on a distress for a RELIEF, a replevin, and conuzance by the bailiff of the Provost of Beverley, setting forth the limitations, and justifying on the ground that a relief was payable. The plaintiff in replevin, concluded to the court, demanding judgment, if the avowry for the relief could be supported. The arguments on the part of the plaintiff, as well as some cases cited in support of these arguments, were directed to show, that the limitation to the heirs gave the estate to *Richard* by purchase. The counsel for the avowant argued, that *Richard* became entitled by descent from his father. Whether *Candish* and *Thorpe* were on the bench, or of counsel with the

avowant, is not clear. The former said, "If the lease had been to the father for *life*, the remainder to his *right heirs*, the father would have had the fee;" and concluded, that because "the lease was to the father for his life, the remainder to *John* his son, in tail, the remainder to the right heirs of the father, if *Richard*" (the second son) "had been then *under age*, the lord should have had the *wardship*, and, by consequence, he should have relief." He added, "If a writ of right had been brought against *John*" (who was tenant in tail) "after the death of his father, he might have joined the *mise* in his own right, and in no other right;" and this, he said, "proved that he had the fee-simple.

Thorpe, in answer to *Finchden*, of counsel with the plaintiff in replevin, observed, "that the objection was to pay a relief, because *Richard* became entitled as a purchaser, in regard that he was the first person in whom the remainder could take effect by the words of the remainder; but," continued he, "your title is as *heir* to your father, and your father had the *freehold preceding*, and if *John* his son and *Eline* his wife had died" (without issue it must be intended) "in his life-time, he would have been tenant in fee-simple, and, for this estate, might have brought a writ of right, and the remainder was not at all limited to you by your proper name, but AS HEIR;" and, for these reasons, it was awarded by all the justices, that a return should

be made, consequently that *Richard* took by descent, and *a relief was payable*.

Of all the cases particularized in the report, this alone is intelligible; and it is the only case from which any conclusion to the rule under consideration, can be drawn. This case, however, is so clear and precise to the purpose, that it does not leave any doubt of the point decided; and it is material that one of the express grounds of the adjudication, was, that the ancestor *had a FREEHOLD preceding*.

There are some cases of an earlier date, and a few subsequent to this decision and prior to *Shelley's* case, all enforcing the same rule (*n*).

The most early case in our books, was determined in M. 18. Ed. II. (*o*); and one of the reasons assigned by the court, for construing the heirs to have taken by descent, was, that *otherwise the fee and the right would, after the determination of prior estates of inheritance in tail, have been in NOBODY*.

A very remarkable circumstance is, that none of these cases take any notice of the policy which induced the courts to put this construction on several limitations to the ancestor and his heirs; and Mr. Justice *Blackstone* (*p*), in delivering his opinion on *Perrin* and *Blake*, while before the Court of Exchequer, on a writ

(*n*) F. N. B. 196 H; 5 Edw. IV. 2. 11. H. 4. p. 227 b.

(*o*) Mayn. Edw. II. fo. 577.

(*p*) Harg. Law Tracts, 1 vol. 498. 500.

of error, held it by no means clear "That this rule took its rise, merely FROM FEODAL principles; he was rather inclined to believe it was first established to prevent the inheritance from being in *abeyance*, and that one principal foundation of it, was to obviate the mischief of too frequently putting the inheritance in suspense or *abeyance*. Another foundation," he said, "might be, and was probably laid in a principle diametrically opposite to the genius of the feudal institutions; namely, a desire to *facilitate* the alienation of land, and to throw it into the track of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser."

Against the first branch of this hypothesis, it may be fairly alleged, that it proves nothing, or proves the very point insisted on. For, as between whom, except the *lord* and *tenant*, or how, as between them, unless it was in regard to the fruits of the seignior, could there have arisen any difference, whether the inheritance was vested or in *abeyance*? The doctrine of the law, requiring that *contingent interests of freehold shall be supported by preceding particular estates of the same quality*, and that such contingent interests of freehold shall be void in event, unless they become vested in interest before the determination of *all* the particular estates of freehold by which they are preceded, or, *eo instanti* in which they determine, and in relation to which

they are remainders, had abundantly provided for the inconveniencies which might otherwise have arisen to *strangers*, or, even to the *lords* themselves, in any other respect than as relates to the fruits of seignior; and there is not any trace from which it can be fairly inferred, that a wish to facilitate the powers of VOLUNTARY *alienation*, in the then generation, could, at this early period of the laws of property, have, in any degree, influenced the decisions of the courts of justice. Fruits of tenure, rather than the power of alienation, engaged the attention of the courts.

The provisions of the Statute *de Donis*, passed about this time (*q*) ; the low, though improving state of commerce, and the fettered terms imposed on the alienation of estates, are strong arguments to be urged against the second branch of the hypothesis.

Besides, to account for the rule, by this branch of the hypothesis, is to assign a cause by no means equal to, if at all corresponding with, the effect, especially in the application of the rule to limitations to *heirs of the body* ; since it was not till *the reign of the Fourth Edward* that an ESTATE-TAIL conferred the power of aliening the inheritance ; and, even in this advanced period of estates-tail, the alienation was made under a *mode of assurance*, a *common recovery*, founded in fiction, and invented for the very purpose of evading, through the medium of a fiction, the express provisions of the Statute of

(*q*) The reign of the First Edward.

Intails, commonly cited under the name of the Statute *de Donis*.

To return to the consideration of the circumstances which call the rule into operative force.

That the rule may apply, the ancestor **MUST** take a preceding estate OF FREEHOLD, either by limitation, by resulting use (*r*), or implication of law (*s*).

He must take that estate by, under, or as a consequence of, the SAME deed or instrument which contains the limitation to his heirs; so that the several instruments, if there be several, may be parts of the same transaction (*t*); as, a deed or will creating a power, and an appointment exercising the power (*u*), or a will, and a codicil being part of the will (*x*).

In those instances in which the estate limited to the ancestor, is for years only, and he does not take any estate of freehold (*y*), or an estate of freehold is limited to him by one deed or instrument, and the limitation to his heirs is by another deed or instrument (*z*), (without any regard to the priority of the instruments to

(*r*) *Pybus and Mitford*, 1 Vent. 372; *Wills and Palmer*, *supra*.

(*s*) *Hayes and Ford*, 2 Black. Rep. 64.

(*t*) *Watk. Desc.* 158. 165.

(*u*) *Venables v. Morris*, 7 T. Rep. 342. 438.

(*x*) *Hayes v. Ford*, 2 J. Bl. Rep. 698.

(*y*) *Tippen's Ca.* 1 P. W. 359; *Harris and Barnes*, 4 Burr. 2157; 1 Inst. 319 b.

(*z*) *Moor and Parker*, L. Raym. 37; *Fonnereau v. Fonnereau*, Dougl. Rep. 470; *Snow and Cutler*, 1 Lev. 135.

which one or the other of the limitations owes its existence, and under which it is to receive effect) the rule has not any application.

Against the union of a limitation *to the heirs* in a deed of *appointment* to uses, taking effect *under a power*, inserted in the DEED or WILL, containing the *limitation of the estate of freehold* to the ancestor, there are some objections. The strongest, and one which does not appear to have been yet suggested, is, that an interest, *once determined to be an estate for life*, without any reference to or connection with the *inheritance* in the tenant of that estate, does, by subsequent matter, and, in some cases, by the act of a third person, become an estate of inheritance. Another objection is, that the heirs do not, in reference to the estate of their ancestor, take by way of remainder.

Some gentlemen, of distinguished eminence, are of opinion, that *Hurst v. Winchelsea* (a), goes the full length of this doctrine, *viz.* that when an appointment is to the heirs of *the body of A*, who took a life estate under the deed creating the power, it is of the same effect as if the estate, so appointed, had been originally limited to *A* for life, and after his decease, to the heirs of his body.

But it deserves consideration, whether the case of *Hurst* and *Winchelsea* did not turn on the ground that the operation of the appoint-

(a) 2 Burr. 879; 1 J. Blackstone, 187.

ment was superseded by the instantaneous descent to the heir, and consequently the heir took by descent as his better title. This, it should seem, is the point determined by *Hurst v. Winchelsea*.

In the opinion of Mr. *Fearne* (b), the rule has not any application, in those instances in which the ancestor has the freehold merely *as a trustee*; taking no BENEFICIAL INTEREST in *that estate*.

This position of Mr. *Fearne*, seems equally questionable. It supposes that the ancestor has the beneficial interest of the limitation to his *heirs*, merely in respect of, and because he takes a *beneficial interest under the limitation to himself*; and assumes it as a settled point, that the law recognizes the trust of the estate of freehold limited to the ancestor; while resorting to first principles of law, and the spirit of the rule, the declaration of trust, annexed to the limitation of the freehold to the ancestor, does not appear to make any difference. It is not clear *that the law can take any notice of this equitable interest*; and if it recognize that interest, still, in any point of view, *the two limitations are EQUALLY THE OBJECTS OF THE RULE*, as a rule of tenure.

These gifts involve every reason which made it necessary to frame the rule; for if this case had happened while wardship and other fruits of

(b) Butler's *Fearne*, p. 39.

seignior were the consequences of the tenure, it would have been equally as injurious to the lord, that the *tenant* should take by purchase, as if the ancestor had received the freehold, discharged from the trust. And to allow that the rule does *not extend to a case with these circumstances, is to depart from the terms of the rule, and the spirit of the same, so far as that spirit can now be collected*; and to introduce an equitable circumstance, in opposition to the legal effect of a conveyance.

Nor is the case of *Moor and Parker* (c) (the leading authority for the position, that the several limitations to the ancestor and his heirs, must be contained in, or *mediately or immediately* owe their effect to, the same instrument,) over-ruled by the determination of *Hayes and Ford* (d). The latter case arose on a devise by a man to the heirs male of his brother N's sons, after, and in remainder of, a limitation to his brother W and his heirs males; and the testator, by a *schedule* annexed to his *will*, and *referring thereto*, and, by a special verdict, found to be *part thereof*, and purporting to be an account of the manner in which he had disposed of his property, said, "And for want of his brother W's having sons, then to his brother N's sons, and for want of sons, then over;" and on an appeal from the Court of King's Bench in Ireland, (where it was held, that the sons of N took

(c) *Supra*, Ld. Raym. 37.

(d) 4 J. Bl. Rep. 698.

only an estate for life,) to the Court of King's Bench in England, it was determined that a son took an estate-tail. This determination was pronounced, expressly, on the ground, that by the will, as explained by the schedule, the son took an estate for life by *implication*, and that estate attracted to him the benefit of the limitation to his heirs males : so that the court assumed it to be a *fact*, that the *will* and *schedule* were in legal intendment, *several parts* of the *SAME* instrument, and that the words of one paper, might be called in aid of the construction, and in order to the exposition, of the words in the other paper.

So as the preceding estate be of freehold, it is immaterial, whether the same be for *life* or in *tail*, or for the life of the *party*, or the life of any other person, or for the *joint* or *several* lives of the party and some other person ; or be to two persons jointly, though the limitation be to their heirs as tenants in common (*ef*) ; or be *absolute*, as for *life certainly* ; or have a collateral determination, as *during widowhood* ; or, as hath been already noticed, arise by *express* limitation, *implication* of law, or *resulting use*.

And though the estate be determinable on an event which may happen in the life-time of the ancestor (*g*) ; as to *A* and *B* for the life of *C*,

(*ef*) 9 Mod. 292.

(*g*) Fearne, 33 ; Perk. § 337 ; see Cases *contra*, Butler's Fearne, 30 ; and Distinctions, *infra*.

remainder to the *right heirs* of *A*, or to a woman during her *widowhood* (*h*), remainder, after *her* DECEASE, to her heirs of her body ; so that the particular estate of freehold limited to the ancestor, may determine in his life-time ; in the first example, by the death of *C* ; and in the second example, by the marriage of the widow ; and consequently, with a view to both these cases, before there can be any one to fulfil the character of heirs, in relation to the tenant of the estate of freehold, the rule will apply.

Jones said, " this remainder, to a widow, was contingent (*i*) ;" but this is an opinion which should not be followed without very mature consideration.

Indeed, Sir *William Grant* seems to have been of a contrary opinion in *Curtis v. Price* (*h*). He observed, " If the proposed construction be adopted, then the remainder to the heirs of the body of *Eleanor Barry* will be not contingent but vested, and will unite with the estate for life. I am taking that for granted, that it will unite, though it was in some degree argued, but not pressed, that, as her estate is to terminate in case of her second marriage, the two estates could not unite so as to vest a complete estate-tail. That point is quite at rest ; for all that

(*h*) *Merrel and Rumsey*, Raym. 126 ; *Curtis v. Price*, 12 Ves. 89.

(*i*) 1 Siderf. 207 ; *Butler's Fearn*e, 30.

is required by the rule in *Shelley's* case is, that the ancestor shall take an estate of freehold, and afterwards, in the same conveyance, an estate shall be given to his heirs. The estate, during widowhood, is an estate of freehold; and the possibility that it may terminate in the life of the widow, and before there can be an heir, is no objection."

Nor is it of any importance that the ancestor may or *may not be living at the time* when the gift to his heirs is, by the words introducing that gift, to take place (*k*); as to two persons who are husband and wife, during their *joint* lives, and, after the decease of *either of them*, to the heirs of the body of the wife begotten *by the husband*; so that the wife may die in the life-time of her husband, or survive him; and if she survive him, *her ESTATE OF FREEHOLD* will have determined in her life-time.

Nor that the ancestor *must die*, before the object of the gift to the heirs can be ascertained, or, in other words, before it is certain, that he, in *particular*, is the person to whose heirs the limitation is made (*l*); as to *A* and *B*, so long as they *jointly* together live, remainder to the right heirs of him *that dieth first*.

Although the object of that gift cannot be ascertained till the death of one of the tenants

(*k*) *Merrel and Rumsey*, 1 Keb. 188; Raym. 126; Siderf. 427; 4 Bac. Abr. 301.

(*l*) *Fearne*, 32, 33; 1 Inst. 378.

for life, and although it is on a contingency, viz. to the heirs of the person who shall *first die*, that the second gift is made, and although the second limitation cannot, by any possibility, give him a vested interest in his life-time; STILL THE RULE APPLIES; and the limitation to the heirs will give to the ancestor the benefit imported by that gift.

The several examples introduced to illustrate the second and third propositions, also, in some degree, illustrate the first. The third goes somewhat farther; exhibiting a case in which the ancestor's estate of freehold must necessarily determine before the limitation to his heirs can give a vested interest. On these examples, one additional observation may be made. They all, except the last, immediately and from the first instant, give VESTED INTERESTS, and consequently estates either in possession or in remainder, to the ancestor. The last example gives a CONTINGENT INTEREST to the ancestor; because it is uncertain which of the donees is to be the ancestor to the heirs.

Suppose a particular freehold interest to be limited to *A*, on an *event* and in remainder, with a remainder to the right heirs of *A*; can the fee become vested in *A* before the freehold shall be vested in him? It should seem not.

To bring a case within the rule, the limitation must be to the right heirs of *the person who*

has the freehold, and not to the right heirs of another person; for when the right heirs of another person are the objects, the donee for life cannot take, except as a purchaser, *eo nomine*, or by reason that there is, in respect of this limitation, a resulting use to him.

These positions will demonstrate, with sufficient accuracy, of what nature that estate of freehold must be, which, connected with a limitation to the heirs of the person who takes the freehold, will attract to him the benefit of the limitation to his heirs. They are all examples afforded by cases expressly determined on the point; and the principle of these determinations, in the terms they are stated, seems to supply authorities for most of the cases which can be proposed, in reference to the nature and qualities of the ancestor's estate of freehold.

And, according to one of our most celebrated law writers (*m*), (and under this *appellation* the name of Mr. *Fearne* will readily occur) it may be considered as a general rule, "That whenever the ancestor takes an estate of freehold, whether it be, or be not, such as may determine in his life-time, and there is *afterwards, in the same conveyance*, an *unconditional* limitation to his right heirs, or heirs in tail, (either immediately, and without the intervention of any mesne estate of freehold, between his freehold and the subsequent limitation to his heirs; or

(*m*) *Fearne*, 37: *Perk.* § 337.

mediately, that is, with the interposition of some such mesne estate) there such subsequent limitation to the heirs, or heirs in tail, vests immediately in the ancestor, and does not remain in contingency or abeyance; with the distinction that where such subsequent limitation is immediate, it then becomes executed in the ancestor; forming, by its union with his particular freehold, one estate of inheritance in possession: but where such limitation is mediate, it is then a remainder vested in the ancestor, who takes the freehold, not to be executed in possession, till the determination of the preceding mesne estates."

To the observation, that the limitation to the heirs, in order that it may give a *vested* interest, must be *unconditional*, it must be added, that this limitation must be to the heirs of some *certain* person, as of *A B*, and not leave the ancestor, whose heirs are the designed objects of the limitation, unascertained; as to the heirs of *such one* of several persons as *shall first die*. On this point some observations have been already made, and others will be subjoined.

So if a gift be to two, and the right heirs of the survivor, the remainder is contingent; and it is contingent by reason of the uncertainty of the person in whom it is to vest, and not, in any respect, on account of the duration of the particular estate.

The limitations are within the rule in *Shelley's*

case, to make the *right heirs* words of limitation; but the gifts are governed by the rules respecting contingent remainders, and these rules prevent the vesting of the inheritance.

It is quite clear that an estate to *A* for the life of *B*, and after the death of *B*, or after the determination of the estate of *A*, would *vest* the inheritance in *A*.

And it is necessary to remark, that though the limitation to the heirs may, *originally*, give a CONTINGENT INTEREST, the interest imported by that limitation may, by the rise of the event, or the lapse of the time, which makes the remainder contingent, *vest* in the ancestor; and though the remainder should not vest in the ancestor, and though it could not, by any *possibility*, become a *vested interest* in him, he will have the same as a CONTINGENT INTEREST, which his heirs, if they ever become entitled, must derive from him by descent. And this interest, though it cannot be granted or transferred by deed or fine, may be bound by estoppel, and will confer on its owner, if the person be ascertained, the *right* of releasing, &c. and also, unless there be an intail, the power of alienation by will.

The positions which have been advanced, will have led to the opinion, that the *quality* of the estate to pass by the limitation to the *heirs*, with regard to its being vested or contingent, will not, in any case, depend merely on the

nature or quality of the ancestor's estate of freehold ; with the exception, perhaps, that the gift to the heirs cannot give a title to a vested interest, while the freehold, which is to attract the benefit of that limitation, is a mere contingent interest.

The contingency of an interest under a limitation to the heirs, must depend on some circumstance or event, independent of the determination of that estate ; making it necessary that some act should be done, time elapse, or event take place, which is so far *unconnected* with the determination of the ancestor's estate, that it *may not* happen during the continuance of that estate, nor in the instant in which it shall determine.

All these observations take the application of the rule to be granted, and proceed on a supposition of its applicability.

In those instances also to which the rule does *not* apply, the limitation to the heirs as such will, according to the circumstance that their ancestor is living or dead, give a *vested* or *contingent* interest to ~~the~~ *persons* who are the *objects*, described by the terms of the gift.

Also, though the estate of freehold be limited to *two or more persons jointly, or* AS TENANTS IN COMMON, THE RULE IS ADMISSIBLE.

Whether, under such circumstances, the limitation to the heirs will give a joint interest, or several and distinct interests, to the ancestors,

or to one of them separately, will depend on the terms of the gift to the heirs, as will be noticed in the sequel of these observations.

Also, though the freehold be limited to *one* person, and the limitation be to the heirs, or heirs of the body, of that person and *another*, or of that person and *several others*, the ancestor taking the estate of freehold *may*, under this rule, (and, with certain exceptions, arising from the circumstance that the heirs may be the issue of two persons who are married, or may lawfully intermarry,) have the inheritance, to the extent of that part which is his share; according to the number of persons to whose heirs the limitation is made.

On this point, also, some further remarks will be made in a subsequent part of this chapter.

It must be observed too, in this place, *that the several limitations to the ancestor and his heirs, must both give interests of the same nature or quality, either both legal or both equitable; and not one a legal and the other a trust estate (n);* and it has sometimes been said, *the ancestor must not have the estate of freehold MERELY AS A TRUSTEE (o).*

Of equitable estates, and trusts for separate use, and estates arising from devises in wills, as

(n) Fearn, 68; *Jones v. Say and Sele*, 8 Vin. 262. c. 19; 3 Bro. P. C. 458; *Tippen v. Cosin*, Carth. 372; 4 Mod. 380; *Silvester v. Wilson*, 2 Term Rep. K. B. 444; *Doe v. Hinks*, 7 T. Rep. 341; *Venables and Morris*, 7 T. Rep. 348; *Doe ex dem. White v. Simpson*, 5 East, 162; *Doe v. Ironmonger*, 3 East, 532.

(o) *Supra*, 311.

forming exceptions to the rule, some notice will be taken before the present subject shall be dismissed.

The limitation to the heirs must be to the heirs of the person who takes a freehold, and not to the heirs of an ancestor of that person ; and it must be to those heirs *generally* or *specialy* ; and the estate will be a fee or fee-tail, and a fee-simple, determinable or qualified, and a fee-tail, general or special, according to the extent of the words of limitation to the heirs.

In a deed, the gift must be to the heirs, or heirs of the body, as a class, and not to a single heir ; and a gift to a man for life, remainder to his heirs male in fee, was decided to be a gift to the person who first answered the description (*p*). At the same time, it is to be remembered, that in wills, the words heir of the body, may be *nomen collectivum*, and be descriptive of successive heirs (*q*), and influenced by the rule.

The heirs must, in *deeds*, be described by that word, and in *wills* by the same, or some such appropriated or substituted term, and as the *class* or denomination of persons, who are the legal successors of the ancestor, in a regular course of descent, with a view to an estate in fee or fee-tail to be derived from him.

(*p*) *Bayley v. Morris*, 4 Ves. 785.

(*q*) See chap. on Fee ; *Dubber v. Trollope*, 8 Vin. Abr. 233 ; *Richards v. Bergavenny*, 2 Vern. 324 ; *Blackburn v. Stables*, 2 Ves. & Beames, 370.

These heirs may be named,

- 1st, To take immediately after the death of the ancestor; or,
- 2dly, At any time after the determination of his estate, though that estate may determine in his *life-time*; or,
- 3dly, They may be named to take after the determination of estates limited in remainder of the estate of the ancestor, and notwithstanding the ancestor's estate must determine before the limitation to his heirs, if considered as heirs taking in their own right, could give a vested interest; or,
- 4thly, They may be named to take at a time which, in reference to the estate limited to the ancestor, without any dependance on other estates, may not happen so early as the period at which the ancestor's estate will determine; or,
- 5thly, The limitation to the heirs may be made to depend for effect on a contingency, or to give an interest which may be contingent, from the uncertainty of the person described as the ancestor (*r*).

To a limitation to the heirs, to take effect *by* **SPRINGING USE**, the rule has no application. This is admitted (*rr*); and ought to have great influence in deciding the effect of a limitation

(*r*) *Supra*, 315, 316.

(*rr*) *Fearne*, 414; *Lloyd v. Carew*, Prec: in Chan. 72; *Show Par. Ca.* 137.

to a man in express terms by one deed, and a limitation by another deed or instrument, to his heirs, under a power of appointment contained in the first deed. For what more or less than a springing use, is an use to arise from the exercise of a power of appointment? -

The case of the springing use also seems to prove the position, that the limitation to the heirs must be by way of *remainder* (s), and remotely, and in some degree at least, if not immediately expectant on the ancestor's estate of freehold: for on what other possible ground can an objection be raised against the title of the ancestor under the limitation to his heirs? The case of a springing use is much stronger in favour of the rule, than the instance of several limitations arising from *different* instruments; though the limitation to the heirs is made in pursuance of a POWER OF APPOINTMENT TO USES, contained in a deed or instrument giving the ancestor an estate of *freehold*.

It is also requisite that the limitation should be to the heirs of the person who takes an estate of freehold; thus treating him as the ancestor.

That the limitation may be to the heirs on a contingency, is proved, in addition to the authorities already cited, by a case in which a gift was to A for life, and if she married after the death of the testator, and had heirs of her body, then the heirs to have the land, and

(s) Fearn, 416.

still the ancestor took the benefit of the limitation to his heirs (*t*).

It has been proposed that the limitation to the heirs must be to them as a *class* of persons and the legal *successors*. By these positions it must *not be understood that the intention of the parties necessarily must be that the heirs should take by descent* (*u*).

On the line of distinction, on this point, the more material observations have been already made.

All that is required, to call the rule into operative force is, that the heirs should be designated to take in that character, and by that, or, in wills, some such substituted *name* (*x*); or, in the more pointed language of Mr. *Fearne* (*y*), "That the limitation to the heirs, &c. is so calculated and directed, that the person claiming under it, must entitle himself, merely under the *description* of heirs, of the species denoted by the words in their *technical* sense, and that there is nothing to restrain the same words from equally extending to, and comprehending all other persons, successively answering the same description, or from entitling them alike under it, and by that name only.

Nor will it be any objection to the application of the rule, when the circumstances which

(*t*) 1 Roll. 839. l. 32; Com. Dig. Devise (N. 5.)

(*u*) Harg. Tracts, 1 Vol. 562, 563.

(*x*) See *supra*, p. 342.

(*y*) On Contingent Remainders, p. 313; and see 1 Harg. Tracts, 563. 575.

call the rule into operation exist, that it appears to be *probable*, nay even certain, that the heirs, *as a class of persons*, were intended to take originally, in their own right, and that the first estate, *viz.* the estate of freehold, was meant to be a mere estate for life, without any further interest, present or remote, in the ancestor (*z*).

Even a declaration that the heirs, or heirs of the body, should take by *purchase*, would not, singly and alone, exclude the rule.

In many cases, arising as well on *deeds* as in *wills*, this has been the *evident intention*, and yet it has not prevailed. The object of the rule is, as it has been shown, to *frustrate* THIS INTENTION, as often as the word *heirs embraces all the persons, successively* ANSWERING THAT DESCRIPTION, as the class of persons described by that term; for when the author of several gifts, one to the ancestor, the other to his heirs, or heirs of his body, means that the ancestor should take for his life only, and that every other person who, in succession from generation to generation, shall be his heir, should take as his heir, and yet that these heirs, or some of them, should take in their own right, as purchasers by that name, independently of their ancestor, he then means *that which the law will not suffer him to give, or the heir to TAKE AS A PURCHASER*; for all persons claiming under a description or words of designation of *all possible heirs*, must take *as heirs* and not *as purchasers*; for taking

(2) 1 Brown's Ch. Ca. 220; *Thong v. Bedford*, *ibid.* 313.

under the name and in the character of heirs, they must take in the quality of heirs; by descent, and not by purchase (*a*).

So in other instances, though a reference has been made to the limitation to the *heirs*, as giving *contingent* interests (*b*), and making it proper to insert a limitation to trustees for supporting these interests, while, in fact, there were not any interests of this quality, unless the limitation to the *heirs* should be construed to give an interest to them as purchasers by that name; or though words explanatory of the intention of a testator, and restrictive of the powers of alienation, which may be exercised by tenant in tail, have been added (*c*); or though it has been declared in terms, that the heirs were to take by *purchase* (*d*); or *severally* and *successively* by way of *remainder* (*e*), or as tenants in common, and not as joint-tenants (*f*) or the gift has been to heirs of the body, if any, with a limitation in default of such issue (*g*), the rule has been applied.

Observations to this effect have been already urged; and in proof of these positions, other

(*a*) *P. Thurlow* in *Jones and Morgan*, 1 Bro. Ch. Ca. 220.

(*b*) *Coulson and Coulson*, 2 Str. 1125; *Ambrose and Hodgson*, *supra*; *Sayer and Masterman*, *Fearne*, 250; *Ambl.* 344.

(*c*) *Hayes v. Ford*, 2 Black. Rep. 698.

(*d*) 1 Harg. Tracts, 562.

(*e*) *Lowe v. Davis*, 2 Lord Raym. 1561.

(*f*) *Doe v. Smith*, 7 T. Rep. 532; but see 4 Bro. C. C. 542.

(*g*) *Elton v. Eason*, in Note to 1 Merr. 671.

cases will, in considering the exceptions to the rule, be introduced.

Indeed, it may be assumed as a general position, that it is more on the sense and extent in which the word *heirs* is used in a deed, will, or other instrument, than on any other circumstance, that the construction of the several limitations must depend.

The observation submitted to the reader, on the object of the rule, showing its political tendency, must be called to his recollection.

From these observations, the meaning which is affixed to the terms "a class or denomination of persons," may be easily comprehended.

As the great object of the rule is, from the limitation to the *heirs*, to raise an interest to the ancestor, the circumstance that the ancestor takes an estate under the limitation to his heirs, renders that limitation of the same effect, as if it were made to him and his *heirs*, or his heirs of his body.

It follows, that the heirs cannot take as *purchasers*; and if, by reason of the death of the ancestor in the life-time of a testator, or for any other cause, the limitation of the estate of freehold should be or become void as to *him*, the limitation to his *heirs* would also be void.

This point was determined in the case of *Hodgson* and *Ambrose*, which has been so often noticed.

Not does the rule interfere with the *quality* of the estate, to make it *vested* or *contingent*, otherwise than by establishing the point, that the interest *cannot be contingent*, merely from the circumstance that the heirs of a particular person who is living and ascertained are, in terms, the object of the limitation.

Nor will the quality of the estate limited to the heirs be determined by the quality of the estate limited to the ancestors: therefore, though the limitation be to the heirs, as tenants in common, it does not follow that the estate of freehold shall partake of that quality (*h*). So the ancestors may take *the freehold as joint-tenants*, and *the inheritance* as tenants in common. Thus, a gift to two (who may not lawfully intermarry) for their lives, with remainder to the heirs of their bodies, will be a joint freehold in them, with several inheritances (*i*).

It is too much, however, to concede the position inferred from *Brooke*, that the heir shall be in as heir, if by any possibility his father might have had the possession: if by this position it is to be understood, that the limitation to the heirs would give a vested interest, in every case in which the ancestor becomes entitled under that limitation.

That position ought to be confined to the *manner* in which the heir is to claim, without

(*h*) *Rogers v. Downe*, 9 Mod. 292.

(*i*) 1 Inst. 182 a.

any regard to the quality of the ancestor's interest; and now since it is settled that the ancestor will be entitled to the benefit to be derived under the limitation to his heirs, though it be *impossible* for that limitation to give a *VESTED interest in his life-time*, the position cannot be cited for any useful purpose.

So far from being law, to prove that the limitation to the heirs cannot give a contingent interest, in those instances in which the ancestor is to be entitled under that limitation, the contrary position is clearly established.

Grant, that either from the uncertainty of a person, whose heirs are within the terms of the limitation; or of the event on which this limitation is to have effect; or from the consideration that the remainder to his heirs is, in point of intention, and by reason of words which refer to some event, as the marriage of C, or of himself; making it necessary, in order to the commencement in possession of the remainder passing under the limitation to the heirs, that some act should be done, or some event take place, the limitation to the heirs may give a contingent interest.

On the other hand, notwithstanding the ancestor's estate of freehold may *determine* in his life-time, and consequently before any person can answer the description of his heirs; as to A during her *widowhood*, remainder after her *decease* to her heirs; or to husband and wife for their *joint* lives, and after the death of *either*

of them, to the heirs of the body of the wife by the husband to be begotten; the interest imported by the limitation to the heirs, *will not be contingent, merely* for that reason.

The instance last adduced, is taken from the case of *Merrel and Rumsey (k)*. In that case it was argued, that as the remainder, depending on the estate to the husband and wife for their joint lives, was limited to the heirs of *one of them*, so that it might be frustrated in case the wife should survive, it was contingent; because, by the death of the husband, the estate for life would determine, and the heirs of the body of the wife by the husband could not take, because *nemo est hæres viventis*.

It is observable, that this argument proceeded on the assumption that the limitation to the heirs, (not from the terms in which it was introduced, for they provided for the death of the husband in the life-time of the wife, by limiting the remainder, to commence on the death either of the husband *or* wife, but from the objects of the limitation, considered as *uncertain* persons) gave an interest which could not take effect in possession, *till the* decease of the wife; and that it must be contingent, because the particular estate might determine before that event; but by the Court, clearly, and with some displeasure at the argument, the words, *heirs*, &c. are not words of *purchase*, but of *limitation* to the wife; and the estate vests in her *presently*, and is not in *con-*

(k) 4 Bac. Abr. 303.

tingency; as if an estate be limited to a woman *durante viduitate*, remainder to her *heirs*, or the *heirs* of her body, this is a *fee-simple* or *fee-tail*, executed in her presently; and though she afterwards *marries*, yet that shall not destroy the estate that was vested and well settled in her before; and here the remainder closes with *the particular estate to all purposes, but dividing the joint-tenancy*, and is no more than an estate to the husband and wife, and the *heirs* of the body of the wife.

From the opinion delivered in this case, it is a fair inference, that the limitation to the *heirs* will give a *vested* interest, in all those cases in which it would give an interest of this sort, if limited to the ancestor and his *heirs*. The spirit of the rule, and the decisions thereon, lead to this conclusion; and this was the opinion which Sir *William Grant* expressed in the case of *Curtis v. Price*; and that case seems to have settled this point.

There are passages in *Fearne* (1) which seem to favour a contrary opinion. That opinion, however, respectable as it is, and fully as it might have been considered by the learned writer, cannot be opposed to the express determination in *Merrel* and *Rumsey*; and, in short, Mr. *Fearne* does not advance it clearly as a position, that the interest is *contingent*. All he seems anxious to establish is, that the limitation to the *heirs*, connected with an estate of freehold

(1) Page 33. 38, 39.

in their ancestor, must *at least* give a *contingent* remainder to the ancestor, and that the heirs cannot be *purchasers*, though it is possible the limitation to them may not, or even though it be impossible it ever should, give a vested interest to the ancestor. And it is to be added, that Mr. *Fearne* (*m*) has in so many words observed, the better conclusion seems to be, that the possibility of the freehold determining in the life of the ancestor, does not keep the subsequent limitation to his heirs from attaching in himself as a *vested interest*. This passage then removes all doubt of his opinion.

The distinction, naturely considered, seems to be, that a remainder to the heirs, or heirs of the body, of a person who takes a preceding estate of freehold, never will be contingent, on account of any event arising from the particular estate; taking such determination singly: but the gift to the heirs may be contingent, because,

1st, It is limited by words of contingency.

2dly, Because it is limited to the heirs, &c. of an uncertain or unascertained person; as the survivor of several persons.

3dly, Because the remainder is limited to commence in express terms, at a period which, in intention as well as by the terms, provides that some other event than that which is to determine the particular estate, must arise before the

gift to the heirs should confer the right to the possession.

The last instance may be exemplified by a gift to *A* for life, and from and after the deaths of *A* and *B*, to the heirs of the body of *A*. It would be inconsistent with all the rules which govern remainders, or the construction of deeds or wills, that the owner of *A*'s estate should, by reason of the gift to the heirs, continue the possession after the death of *A*, notwithstanding *B* should be living at the death of *A*.

When an estate of freehold is limited to an individual, and there is afterwards a limitation to the heirs, or heirs of the body, of that person and of another, by the same clause and by copulative words (*n*); thus, to *A* for life, remainder to the heirs, or heirs of the body, of *A* and *B* (*o*), and these persons are not husband and wife, nor may lawfully intermarry, the limitation to the heirs will be construed, as to one moiety, to give the inheritance to the ancestor who has the freehold; and, as to the other moiety, to give a contingent remainder to the heirs of the person who has not any estate of freehold. But when the several persons, in the case of a limitation *to the right heirs*, are husband and wife; or in the case of a limitation to their heirs of their bodies (*p*), *are married, or may lawfully*

(*n*) 3 Leon. 4; 3 Rep. 8.

(*o*) 2 Roll. Abr. 417. pl. 6.

(*p*) *Frogmorton ex dem. Robinson v. Wharrey*, 3 Wils. 125; 2 Bl. Rep. 728; Dyer, 99; Fearn, 461.

intermarry (*q*) ; in the former case, the limitation to the heirs will give the interest which it imports to their heirs, being the issue of their bodies, originally in *fee* ; and, in the latter case, *quâcunque via data*, the heirs will be PURCHASERS OF AN ESTATE-TAIL, without any right in either of their ancestors, arising from the gift to their heirs.

On the case of *Roe* and *Quartley*, cited in the notes, it is to be observed, that neither of the ancestors took any preceding estate of freehold.

Assuming that this circumstance does, notwithstanding the report in 3 Leon. 4. which is to the contrary, make no difference in the law on a limitation in these terms, so as only one of the parties, either the husband or wife, take an estate of freehold ; the case of *Roe v. Quartley* is introduced as an authority to warrant the position as stated ; and it is with satisfaction that the name and positions of Mr. *Fearne* can be vouched in support of the same conclusion (*r*).

When the husband and wife, or a man and woman who may lawfully intermarry, have an estate of freehold to themselves *jointly*, the limitation to their right heirs will, under these circumstances, give *them* the *inheritance*

(*q*) *Roe v. Quartley*, *Fearne*, 44. 47. 85 ; 1 Term Rep. K. B. 630 ; *Denn v. Gillott*, 2 Term Rep. 435 ; 2 R. Ab. 417. H. pl. 1, 2 ; Dy. 64 ; 1 Leon. 102 ; *Lane and Pannel*, 1 Roll. Rep. 238. 317. 438.

(*r*) Page 460.

jointly (*s*). In the cases cited as in point, to warrant the position so far as it relates to the heirs of the bodies of two persons who are husband and wife, one of them had an estate of freehold, and in regard to a limitation to the heirs of the bodies of two persons, one of whom only takes a preceding estate of freehold, it does not make any difference whether these persons are husband and wife or not, so as they may lawfully intermarry (*t*). When both these persons take an estate of freehold, either together or successively, that estate will entitle THEM JOINTLY to the benefit of a limitation to their heirs, or to their heirs of their bodies (*u*).

In another case, *A* and a woman had an estate for their lives, with a remainder to the heirs of the bodies of the woman and *B* who was her husband; and it was determined that the heirs should take by purchase (*x*).

In those cases in which a grant or limitation is made to *two* jointly, and the heirs of *one* of them (*y*), the limitation to the heirs will give the entirety as an interest to their ancestor, either by

(*s*) 2 Bl. Rep. 1211; Com. Dig. Estates, K. 1.

(*t*) 2 Roll. Abr. p. 417. H. pl. 1, 2; Dyer, 99. 64; 1 Leon. 102.

(*u*) *Gossage and Taylor*, Sty. Rep. 325; *Robinson v. Wharrey*, 3 Wils. 125. 144; 2 Bl. Rep. 728; *Stephens v. Bretridge*, 1 Lev. 36; Raym. 36; *Lane v. Pannel*, 1 Roll. Rep. 238. 317. 438.

(*x*) *Lane v. Pannel*, 1 Roll. Rep. 238. 317. 438.

(*y*) *Fearne*, 41; *Wiscot's case*, 2 Rep. 61; *Winchester's case*, 3 Rep. 1; *Franklyn v. Clithero*, Salk. 568; *Owen v. Morgan*, 3 Rep. 5; 1 Inst. 164 b.

way of immediate estate, so as to be connected with, and form part of, the estate of freehold, *subject to the interest of the joint-tenant*, or by way of remainder, according to the form of the gift, and the circumstance that it does or does not connect the limitation to the heirs, with the limitation to the ancestor; as to two *jointly*, and the heirs or heirs &c. of one of them; or makes a distinction between the several limitations, and the times at which they are to confer a right to the possession; as to two jointly, and *from and after their decease to the heirs of one of them (x)*.

This seems to be the law on the subject; yet the point, that the limitation to the heirs will give a *remainder*, when that limitation is distinct from the limitation to the ancestor and the other person *jointly*, is not sufficiently clear, from the determined cases, to be relied on as definitively settled.

In *Owen's (a)* case, the husband and wife were seised, under limitations to them and the *heirs of the body OF THE HUSBAND*, and the husband alone suffered a common recovery in which he was tenant, and vouched the common vouchee; it was held, that the recovery did NOT BAR *the issue or remainder-men*: and in the *Marquis of Winchester's case (b)*, limitations were made to a man, and a woman not

(x) Litt. § 578; Perk. § 88. 337.

(a) 3 Rep. 5; Moor, 210.

(b) 3 Rep. 1; 1 Vol. Convey. p. 31. 51. 86. 95. 125.

his wife, and the *heirs* of the body of the *man*; and he suffered a recovery with *single* voucher of the entirety; and it was held to be good for one moiety, against the issue and remaindermen. Each of these cases was determined on the ground that the man had not, in the case of *Owen*, an estate-tail in possession in any part or the lands; and in the case of the Marquis of *Winchester*, that he had an estate-tail in possession of one moiety only; and yet in the case of *King* and *Edwards* (c) it was held, that the estate-tail was so far executed in possession, that a *feoffment* by the husband and wife created a *discontinuance* of the entirety.

It is advanced too by Mr. *Wooddeson* (d), in a note to his *Vinerian Lectures*, that "If the particular estate be to *A* and *B*, *jointly* for their lives, remainder to the heirs of the body of *B*, this will be an *estate-tail in B*, EXECUTED in *B*, so as to make the inheritance *not* grantable *distinct* from the particular estate of *freehold*, by way of *remainder*; but on the other hand, not to sever the jointure, or entitle the wife of *B* to dower." 1st *Fearne*, 41, 42. 4th edit. is cited for these positions; and it must be acknowledged, that such conclusion is drawn by that very able writer, from several instances of limitations which he has introduced, and on which he has observed. It is also true, that in one of these instances the limitations were to *A* and *B* for their lives, and after their

(c) *Cro. Car.* 320.

(d) 2 *Vol.* 205.

deaths to the heirs of *B*, as stated by Mr. *Wooddeson*. The other instances are, 1st, a limitation to husband and wife, and the heirs of the body of the husband: 2dly, a limitation to *two men*, and the heirs of *their two bodies*, or to the heirs of the body of one of them: and in both these instances, the several limitations were made by one connected clause. Whether it was to these instances alone, that Mr. *Fearne* intended to confine the observation, that the interest imported by the limitation to THE HEIRS, was not grantable away from, or *without the freehold, by way of remainder*, is not clear.

In the paragraph immediately preceding the passage (*e*) which is selected, that gentleman advances these positions; "When there is a *joint* limitation of the freehold to several, followed up by a joint limitation of the inheritance in fee-simple to them; as an estate to *A* and *B* for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, it seems *the fee vests in them JOINTLY*; and so if the limitation of the freehold be to the baron and feme jointly, remainder to the heirs of their bodies, it is an estate-tail executed in them, as they are capable of issue, to whom such joint inheritance can descend. But if the limitation of the freehold, be not to them jointly, but *successively*; as to one for life, remainder to the

other for life, remainder to the heirs of **THEIR BODIES** ; there it seems the ultimate limitation is not executed in possession, but gives them a remainder in tail."

The distinction, then, perhaps, turns on the point that the ancestor has several and distinct estates, as in *Clithero* and *Franklyn*, or one entire estate ; making the difference to be, that when the ancestors have a joint estate, the limitation to the heirs, even of one of them, will *connect and unite with the estate of that PERSON* ; forming one entire *inseparable interest* ; and that when the estates to the tenants for life are several and distinct, to take place successively, the limitation to *the HEIRS OF ONE*, or both of them, *will give a distinct interest by way of remainder*.

Without attempting to solve this point, since no certain conclusion can be drawn, it may be argued, and, it should seem, relied on, that when several *limitations* give *several and distinct* estates, the remote estates depending on preceding estates, must be *remainders* ; and being distinct estates, and assuming this description, there cannot be any objection to the transfer of such interests, *separately from the estate of FREEHOLD, as remainders* ; and since the estate has the name, and all the qualities of a *remainder*, and, (which is the essential point and distinguishing circumstance) is *distinct from the estate OF FREEHOLD*, what reason can be urged against its conferring the same privileges as are annexed to other estates of the same denomi-

nation?—It follows, that the interest passing by the limitation to the heirs, is improperly called a remainder, or it has all the qualities common to estates comprehended under, and embraced by that term of definition.

And there are many instances in which limitations by an undivided clause, may operate to give distinct estates ; as to a man and the heirs of the body of his *father* (*f*) ; to a man for life, and twenty-one years after his death (*g*).

When the freehold is limited to two, as *tenants in common*, and there is a limitation to the heirs of one of them, it is DIFFICULT TO DECIDE, whether the estate limited to the heirs will, AS TO ONE MOIETY, GIVE AN INTEREST to the ancestor ; and, as to the other moiety, give an interest to the heirs, by way of contingent remainder ; or, as to both moieties, a contingent remainder to the heirs.

It seems most probable, indeed pretty clear, that the inheritance will be in CONTINGENCY as to *one* MOIETY ; and, as to the other moiety, be *vested in interest*. But if a limitation be to two, as *tenants in common*, with a distinct limitation to *their heirs of their bodies*, perhaps it will again be necessary to recur to the distinction arising from the condition of the parties, that they are married, or may or may not lawfully intermarry. For it seems consonant to the spirit of the law, discoverable from decisions in

(*f*) 1 Inst. 27 a ; 3 Convey. 78.

(*g*) *Mordant v. Watts*, Brownl. 19 ; 3 Convey. 86.

other cases, that in those instances in which the persons may not *lawfully intermarry*, the limitation to *their heirs should give them the inheritance as tenants in common*; and that this limitation should give them the inheritance *jointly* in those instances in which they are married or may lawfully intermarry.

When the freehold is limited to *several* persons *jointly*, and there is also a limitation to the heirs of the *survivor* of them (*h*), or to such one of them as shall *first* die (*i*), (so as to leave the *certainty* of the person whose heirs are to be entitled under the limitation, to depend on the *lapse* of time, or the rise of an *event*,) and though the estate to the ancestor must cease, as in the cited instance of a limitation to *two* for their *joint* lives, remainder to the *heirs* of the body of him who shall *first die*, before the objects of the limitation to the *heirs*, (taking that word to refer to the legal successors,) can be ascertained; or the limitation to the heirs is to give an estate upon a contingency; still that limitation will *give to the ancestor the interest which it imports to convey*. This interest, it is true, will, under these or similar circumstances, be contingent. The rule, however, attaches on the several limitations, and the ancestor will have the interest, and the same will be transmissible *from HIM TO HIS HEIRS*,

(*h*) Fearne, 39; *Highway v. Banner* and others, 1 Brown's Ch. Cas. 584.

(*i*) Fearne, 33; 1 Inst. 378 b. *supra*, p. 332.

and be liable to be destroyed by his act; and the heirs cannot claim to be entitled otherwise *than by DESCENT FROM HIM.*

In those cases in which the freehold is limited to *two jointly*, and there is also a limitation to *their heirs*, the limitation to the heirs will give the inheritance to the ancestors *jointly (k)*. This is equally true in application to limitations to heirs generally and to heirs special *(l)*, unless the observation, in reference to heirs special, be applied to limitations to two or more persons, who, either in regard to sex, or from consanguinity or affinity, may not lawfully intermarry, and the heirs of their bodies; for, with this qualification, the several ancestors, though they have the estate of *freehold jointly*, will *have several and distinct inheritances (m)*.

In *Gossage v. Taylor (n)*, Sir R. Frank, on the marriage of his son, levied a fine, and declared the use to himself, during the *joint lives* of himself, and *his son, Leventhorp Frank*; and after the decease of either of them, to the use of *Susan Cotele*, for her life; and after her decease, to the use of the issue male of the said *Susan* and *Leventhorp*, and the heirs of their bodies; and in default of such issue, *to the use of the heirs to be begotten on the body of Susan*,

(k) Fearn, 40; 1 Inst. 183 b; 184.

(l) *Roe v. Aistrop*, 2 Black. Rep. 1228; *Denn v. Gillott*, 2 Term Rep. 431; Fearn, 45.

(m) Fearn, 41; 1 Inst. 182, 184.

(n) Style's Rep. 325.

by the said *Leventhorp*, remainder to the right heirs of Sir *Richard Frank*. The marriage took effect, and *Susan* died, leaving five daughters, but no son. Sir *Richard* died, leaving *Leventhorp* his son and heir. The question was, what estate *Leventhorp* took? and the Court resolved, First, That if he had been joint-tenant with the wife for life, this had been an estate-tail in both, as the word "*heirs*" is not applied to any body particularly (*nn*): Secondly, That neither the husband nor wife had an estate-tail; not the husband, because he had no prior estate for life; not the wife, because, though she took an estate for life, yet the *heirs* are not applied to her body: and, Thirdly, That it was a contingent remainder to the heirs of both their bodies (*o*).

When the ancestors have several, successive, and distinct estates for their lives, and the heirs who are to take under the secondary limitation, are to be of their bodies, the limitation to these heirs will give an estate of inheritance to the ancestors, jointly or severally, according to the circumstances, that these persons are or are not husband and wife, or, being not already married to each other, may or may not lawfully intermarry (*p*).

Thus, husband and wife, or persons who may lawfully intermarry, will take the inheritance jointly; and persons who are not already

(*nn*) Litt. § 28.

(*o*) See 2 T. R. 435.

(*p*) *Supra*, 343.

married, and may not lawfully intermarry, will have the inheritance severally and distinctly.

If the ancestors be husband and wife (*q*), the limitation to their heirs will give an interest by entireties.

If the ancestors stand in a relation so that they may not lawfully intermarry, each ancestor will have a several and distinct estate of inheritance, unless they are husband and wife *de facto*, though not *de jure*; and, being husband and wife in this manner, they will, it is submitted, have the inheritance by entireties; at least, unless and until the marriage between them shall be dissolved by divorce; and, after such dissolution of the marriage, they will become joint-tenants, if they may lawfully intermarry; but if they may not lawfully intermarry, then they will have the freehold jointly. But whether they will be mere tenants for life, or have several inheritances, is a point for consideration.

To determine on the effect of a limitation to more than two persons, of whom two or more may intermarry, or are actually married, for their lives, with a remainder to their heirs of their bodies, is a task of too great difficulty to be encountered.

On this subject, some conjectures will be offered in the chapter on Estates-Tail.

As often as the limitation naming the heirs is descriptive of the heirs of more persons than take estates of freehold, then the observations

(*q*) Fearn, 41.

already made on limitations of the freehold to one, and to the heirs or heirs of the body of that person, and of one or more persons in addition to him, will apply : and the case of *Gossage v. Taylor* (qq) will lead to the interpretation of the effect of the gift to the heirs.

When the limitations to the ancestor and the heirs are immediate, or eventually become so, by the determination or failure of intermediate estates, the several interests imported by these limitations will consolidate, and, by merger, become one *entire* estate, giving one *undivided time of continuance*.

When other estates are limited immediately, the limitation to the heirs will, during the existence of these estates, give to the ancestor an estate in remainder, to take effect in possession, according to the order in which it is limited ; but in subordination to, and after the determination of, the intermediate estates by which it is preceded, excepting those instances only which are the same in principle or in circumstances, as the case of *Lewis Bowles* (r).

In that case, all the remainders limited mediately between several gifts, one to a man and his wife for their lives, and the other to their heirs of their bodies, were contingent ; and it was held, that an estate-tail, executed in the husband and wife, and entitled them to be deemed tenants of an estate-tail in possession ; but *sub modo*, so that on the vesting of

the contingent remainders, the husband and wife should be tenants for their lives, with a remainder in tail.

In those instances in which there are *super-added words* of limitation, taking notice of the *heirs* of the *heirs*, the influence of the words descriptive of the immediate heirs of the ancestor, must depend on the collective interpretation of the instrument (*s*).

Some observations will now be offered, in explanation of this point.

The general rule is, that although in deeds and wills, words of limitation *are added to* the gift to the heirs, yet if the **ADDITIONAL WORDS ARE OF THE SAME IMPORT**, or rather not at variance, with the former words of limitation, and are *virtually* included in and expressed by these words; the words of limitation, as used in the first instance, will, notwithstanding the words of superadded limitation, enlarge the estate of the ancestor, and will vest in him the interest imported by the limitation to his heirs.

Thus, in *Shelley's case* (*t*), (the identical case from which the rule takes its denomination,) a *fine* was levied by a man to the use of himself *for life*, remainder to the use of the *heirs male* of his body lawfully begotten, and the *heirs males* of the body of such heirs males

(*s*) 7 T. Rep. 533.

(*t*) *Supra*; and see *Gulliver and Ashby*, 1 Black. Rep. 607; 1 Burr. 1928.

lawfully begotten; and yet he had an estate-tail.

Also, in *Goodright v. Pullin* (*u*), a devise was to *N*, for *his life*, remainder to the *heirs males* of the body of the said *N* lawfully to be begotten, and *his heirs* for ever; with a limitation over, if the said *N* should happen to die without such *heir male*; and he took an estate-tail.

Also, in *Allpass v. Watkins* (*x*), arising on a marriage settlement, the uses were declared in favour of the intended husband for life, remainder to the wife for life, remainder to the heirs of the body of the said intended wife, by the said intended husband lawfully begotten, and their heirs and assigns for ever; and for default of such issue, to the right heirs of the said intended husband; yet the wife was tenant in *special tail*.

Also, in *Morris v. Ward*, generally cited by the name of *Morris v. Legay* (*y*), the devise was to the testator's daughter, for her natural life, and then the testator proceeded in these words: "Item, I bequeath to the heirs of the body of my said daughter, begotten, or to be begotten, and to his or her heirs for ever, after my daughter's death, all my before-mentioned plantation, &c.; but, for want of such heirs of the body of my daughter, I give," &c.; and it was decided that the daughter was tenant in tail.

(*u*) 2 Lord Raym. 1437; Str. 729.

(*x*) 8 T. Rep. 516.

(*y*) 2 Burr. 1102.

And in all these, and in many similar instances, it was held, that the superadded words of limitation, being of the same import and extent as those first introduced, and not inconsistent with the nature of the descent, to be pursued in conformity with the provision they made for the heirs, the word *heirs*, in the superadded clause of limitation, should be a WORD OF LIMITATION, and not of purchase.

On the other hand, when the words engrafted on the limitation to the heirs, describe, in point of general intention, an order of succession, totally different from that which must take place under the limitation to the heirs as originally named, and will not admit of the construction, that by the heirs secondly named are meant the heirs in succession of the heirs first named, as the heirs of the ancestor; the words *heirs*, &c. in the first branch of the limitation, will be words of purchase. This exception is instanced by a gift to a man for life, remainder to his heirs and the heirs females of their bodies (*x*): also, by a devise to *A* for life, remainder to his next heir male, and the heirs male of the body of such next heir male (*a*): also by a devise to *A*, and the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and

(*x*) 1 Rep. 96; Per *Anderson*, in *Shelley's case*.

(*a*) *Archer's case*, 1 Rep. 66 b; see also *Loddington & Kime*, 1 Salk. 224.

as joint-tenants (*b*): also, by a gift in a settlement by deed, to the use of *A* for life, remainder to *W* for life, remainder to the *heirs male* of the body of the said *A* by the said *W* lawfully to be begotten, and his heirs; and for want of such, then to the use of all and every the daughters, &c. Lord *Atwanley* decided (*bb*), that the words *heirs male* were words of purchase, and gave a contingent remainder in fee to the person who was heir of *W A* the wife at her death.

And these and the like cases have very properly been allowed to be exceptions to the rule, or rather not within its extent.

In the first instance, the *heirs*, described to be *inheritable as heirs* to the intail, were to be *females*; and in *Archer's* case, the *heirs* to take in succession were to be those heirs only which should be the *issue* of the body of a *particular person*, described by the designation of *the next heir male* of the tenant for life; and in *Doe v. Laming*, females, as well as males, were to take at the same time, and to hold as tenants in common with each other; and the succession, *as the inheritable quality of the estate*, was not, in *Doe v. Laming*, to be confined to males, or to be conducted at all through them; nor, in *Archer's* case, to be extended to *all the heirs* of the *body* of the tenant for life; nor, in *Doe v. Laming*, to admit of the right of primogeniture

(*b*) *Doe v. Laming*, 2 Burr. 1100.

(*bb*) *Bayley v. Morris*, 4 Ves. 788.

between sons, or the exclusion of daughters by a son; and in the case put by *Anderson*, to have construed the word "*heirs*," and in *Archer's* case, the words "*next heir male*," or the words heirs of the body, in *Doe v. Laming*, to have been words of limitation, would have given to the word heir an effect, in direct opposition to a general and contrary intention, clearly and manifestly expressed, and which showed that a particular and limited series only of heirs were to be entitled. And, in the case decided by Lord *Alvanley*, the testator clearly intended such a disposition as was inconsistent with the course of descent under an estate-tail in the parent; and also intended that the persons whom he designated by the description of heirs of the body, should have an estate to them and their heirs *and assigns for ever*.

At the same time it is observable, from the adjudged cases,

First, That words of limitation which import a *fee* engrafted on words which would give an *estate-tail* (c); as to *J R* for *life*, remainder to trustees for his life, remainder to the use of the *heirs males* of the body of the said *J R* and their *heirs*: or,

Secondly, Words which of themselves import a *general intail* engrafted on

(c) *Wright v. Pearson*, Fearn, 187; see also *Denn ex dem. Webb v. Puckey*, 5 T. Rep. 299; *Allpass v. Watkins*, p. 348; *Morris v. Ward*, *ibid*.

words which might, under other circumstances, give *an estate in special tail*; as to *R M* and his *heirs male* of his body and their *issue* : and,

Lastly, In wills, words of clear and proper limitation, engrafted on words of the same extent and import, and which have not any determinate meaning, but may, according to circumstances, and indiscriminately, be words of limitation or of purchase; as to *A B* during his natural *life*, remainder to the *issue male* of his body lawfully begotten, and the *heirs male* of the body of such issue male (*d*), *will not prevent the application or attachment of the rule.*

In all these and the like instances, the words of superadded limitation are understood and construed to be introduced for carrying the general intention more fully and more clearly into effect.

The instances last noticed, with the exception of *Allpass v. Watkins*, arose on gifts in wills.

The same rules of construction, as far as relates to the words of superadded limitation, (allowing for the difference of words requisite in deeds and wills, to limit estates,) apply to *deeds*, and this is evident from *Allpass v. Watkins*.

Perhaps it will not be too much to assume it as a general conclusion, deducible from the authorities which have been noticed, that the

(*d*) *Dodson v. Grew*, 2 Wils. 322; see 2 T. Rep. 299.

point of difference furnished by the cases (e), is, that whenever the **SUPERADDED WORDS OF LIMITATION** *do, intentionally, give a direction to the course of descent, different from that which must take place under the former branch of the gift, so often the words heirs, &c.* in that branch of the limitation, will be *words of PURCHASE*, and not of limitation; but, as often as the *superadded words are included in, and do not, in their extent, exceed the preceding words;* but the words heirs, &c. in the several parts of the gift, are in *terms*, or, at least in construction, of equal extent, the latter words are surplusage, and the preceding words, as connected with the limitation to the ancestor, will be taken to be *words of LIMITATION*.

Probably, in some of the adduced instances, the construction was influenced more by the rules of interpretation propounded in the chapter on Estates-Tail, than the rule treated of in the present chapter; since to have construed the words *issue male* to be words of purchase, would *have defeated the general intention* of the testator; either by giving the estate to a single individual, to the exclusion of other persons within the same description; or by giving the estate to several persons for their lives, with several inheritances, and thereby excluding the issue of each child from the aliquot parts of every other person besides his own *parent*. And in the late case of *Candler v. Smith* (f), Lord

(e) 7 T. Rep. 533.

(f) *Ibid.*

Kenyon evidently treated *Dodson v. Grew* in that light.

The following cases further illustrate the rule, as it applies to words of superadded limitation.

A devise was to *A* for life, without impeachment for waste, and after his decease to the issue male of his body, and the heirs and assigns of such issue male ; and, for default of such issue male, then to another for life, with remainders over, and it was decided that *A* had an estate in tail male (*g*). But the general intention governs cases of this and the like description ; for, as Lord *Kenyon* observed, in *Doe v. Collis* (*h*), in a will, *issue* is a word either of purchase or limitation, as will *best answer* the intention of the devisor ; though, in the case of a deed, it is *universally* taken as a *word of purchase*.

As a general proposition, and with the observation that the several limitations must both give *legal* or both give *equitable* interests, *the rule extends as well to equitable estates, being trusts executed* (*i*), *as to legal estates* ; with the exception of those cases of trust which have circumstances indicative of an intention contrary to and incompatible with, the effect which would attend the construction that the heirs are to take by succession in a course of descent. In cases of executory trusts, and, in short, all other cases, the manifest intention, with apt

(*g*) *King v. Burchell*, Ambl. 379 ; *Frank v. Stovin*, 3 East, 548.

(*h*) 4 T. R. 399.

(*i*) *Bale v. Coleman*, 1 P. W. 142.

words according to the form, precludes the application of the rule (ii).

In regard to trusts which are executory, and leave the *direction of a conveyance* to devolve on the Court of Chancery, by making it necessary that the trustees should act, and the Court may interfere to have that act properly done; that Court, which, exclusively, has jurisdiction over interests of this sort, will consider the object of the parties, and, *notwithstanding the rule under consideration, will direct a conveyance, agreeable to the manifest intention*; whether that intention can be collected from the nature of the instrument; as *marriage articles*, and the persons they generally have in contemplation, and for whom they at least intend, if they do not profess, to provide; as the *children* of the marriage; or from expressions which clearly demonstrate that the estate of the father is not to be enlarged by the limitation to his heirs; and that by the limitation to the heirs, *sons, daughters children quatenus sons, daughters children, and their issue*, and not hereditary successors, as a collective class of persons, are meant; the Court *proceeding* on the notion that the rule is controllable by arguments of intention, which, applied to legal estates, or *even trusts which are executed*, would not be of any avail (k).

Limitations in marriage articles are ALWAYS considered as raising *executory trusts*, unless the

(ii) Burr. 1106, 1107. (k) Fearn, 71.

parties, *previous to their marriage*, carry these articles into execution by a *settlement* in fact; or unless there be a context, leading to a different result, by a reference to uses, and adopting them.

When such settlement is previous to the marriage, and without any reference to them, the articles are annulled, and no resort can be had to the articles.

It has been said, this is on the ground of a supposed *change of intention*; but it is submitted to be, for *want of jurisdiction* in courts of equity.

To the general terms of these positions, there is an exception, arising from the fact, that it appears, on the *face* of the settlement, that the parties had the articles in their contemplation, and that the settlement was made in *pursuance* of, and with a view to perform the articles.

Under these circumstances, the Court of Chancery will resort to the articles, and decree an execution of the articles, by limitations in *strict settlement*; construing the words *heirs of the body*, to mean *first and other sons*, and *the heirs*, &c. or heirs males of their bodies, according to the usual forms of settlements; and inserting estates to trustees to *support* and *preserve* the *contingent remainders* of freehold interests; and by that means insure effect to the intention of the parties.

That a trust raised by *deed*, not being *marriage articles*, or by a *will*, may be deemed

executory, it must appear, *by express declaration*, that the trusts *are to settle or convey*, &c. so that the Court of Chancery may be entitled to interfere, and direct the mode in which the trust shall be performed. This, indeed, is a subtle distinction; but it is clearly established (1).

In the *Essay on Abstracts (m)*, there is embodied a review, by Mr. *Watkins*, of the cases which have been decided on the construction and effect of marriage articles; and the subject will be resumed in a subsequent part of this chapter.

It will now be proper to consider the exceptions to the rule. They naturally fall into an arrangement, which makes it most eligible to consider them as applicable,

1. To limitations of the legal estate;
2. To limitations of *trusts* which are *executed*; and,
3. To limitations of trusts which are *executory*.

In treating of the exceptions, it will be proper to advert, under each head of division, to the difference of construction of similar limitations in *deeds* and *wills*, and to preserve this division, and distinct view of the subject;

(1) *Glenorchy v. Bosville*, Cas. temp. Talb. 4.

(m) 1 Vol. p. 136.

calling to mind that the rule does not apply to those cases in which the heirs are not to have the *inheritance*: thus, in *White and Collins* (n), the secondary limitation was to the *heir* for the term of his NATURAL LIFE, by words of express and definite limitation, which confined the estate of the heir to that *exact and certain period*; thereby giving him a particular estate in direct terms, and negating the conclusion that the HEIRS were to have an estate of a descendible quality, and the rule did not apply. *Seaward v. Willock* (o), is referrible to the same ground of decision.

To limitations of *legal estates* by *deed*, this rule applies uniformly and invariably, with an exception of, first, those instances only, in which the *freehold* is limited to ONE PERSON, and the second limitation is to the heirs of *that person and of another who are husband and wife*; or the heirs of the bodies of that person and another who are already married, or may lawfully marry; so that the persons designated as heirs are to be the COMMON HEIRS of their two bodies, not their respective heirs, or the heirs or heirs of the body of each several person (p): or, secondly, those instances in which words of *engrafted limitation*, or words of modification and regulation, prescribe an order of succession *totally different* from that which would take place under the limitation to the heirs of the

(n) Com. Rep. 289.

(o) 5 East, 198.

(p) *Gosse v. Taylor*, *supra*, 343.

ancestor; as in the example stated by *Anderson*, of a gift to *A* for life, remainder to his *heirs* and the *heirs females* of their bodies (*q*); the example as to *trust* estates (which is understood to be also applicable in its *principle* to legal estates) afforded by the case of *Allgood* and *Withers* (*r*); an example in which, by declaration of trust, equitable interests in lands were, by deed, limited to *W* for life, remainder to the *heirs of the body* of the said *W*, and of *G* and *M* and *their heirs*, executors, administrators and assigns: or, thirdly, those instances in which the word *heirs* appears, by some expression in the same deed or will, to be used as analogous to, and of the same import only with the word *son* or *child*; and this intention is clear from a *reference* to such term of description.

Archer's case, already cited, turns on this ground. That case is also open to the observation that the superadded words of limitation confined the succession to the *heirs* of the NEXT HEIR MALE of the tenant for life, and made that heir the stock or ancestor of a new succession; and, consequently, prescribed an order of succession materially different from, because far less comprehensive than, the one which must have taken place, under the construction, that the words "*next heir male, &c.*" were words of limitation.

(*q*) *Supra*, 349.

(*r*) In Chan. in 1735, cited 2 Burr. 1107; 1 Ves. 150; 2 Atk. 582; 2 Ves. 648.

Waker and *Snow* (*s*) is another example. That case arose on a *fine* levied to the use of *A* for life, remainder to the use of his *first* son, and of the heirs males of *HIS* body, with like limitations respectively to his second, third, fourth, fifth, and sixth sons, remainder to the *right heir male of A to be begotten* AFTER the sixth son, and of his heirs male.

Next follows *Lisle v. Gray* (*t*), a case which arose on a *covenant* by *A* to stand seised to the use of himself for life, remainder to the use of *E* his son for life, remainder to the use of the *first* son of the body of *E*, and the heirs males of the body of such first son, with like limitations to the second, third and fourth sons, by distinct clauses, in tail male, with the following declaration at the end of the limitation to the fourth son, "*and so severally and respectively to every of the HEIRS MALES of the body of the said E, and the HEIRS MALES of the bodies of such HEIRS MALES, according to their ages and seniorities*;" and for default of such issue, then over.

Lowe v. Davies (*u*) depends on words of *explanation*; for in that case *A* devised to *B* and his heirs lawfully to be begotten; that is to say, to his *first*, second, third, and every son and sons successively, lawfully to be begotten of the body of the said *B*, and the heirs of the body of such first, second, third, and every other son

(*s*) Palm. 359.

(*t*) 2 Lev. 223; Raym. 278. 302. 315.

(*u*) 2 Lord Raym. 1561.

and sons successively, lawfully issuing, as they should be in *seniority of age* and *priority of birth* the eldest always and the heirs of his body to be preferred before the youngest and the heirs of his body, and remainder over.

Since in *Gossage v. Taylor* the heirs of the two persons were not to take *distributively*, but were to take jointly as answering the description of one *common* heir, the ancestor could not be entitled to all or any part of the lands in respect of the limitation to the heirs. To have given him any part would have been to put different constructions on the same words, in application to the same subject matter; on words which equally allowed of that construction, or excluded it in respect of every part; and to have given him the whole, would be to allow that the rule extends to those instances, in *which the heirs*, who are named, are to be the *heirs OF THE ANCESTOR and ANOTHER PERSON*; and this is carrying the rule beyond its terms or its principle.

In the other cases, the heirs took originally in their own right; and the engrafted words of limitation described the order of succession from them as the *stock* or first purchasers. In the case stated by *Anderson*, the ancestor would have taken an estate in fee, in the supposition that the limitation to him and his heirs gave the inheritance to him; while, from the superadded words of limitation, the intention of the parties

was clear, to create an estate in TAIL FEMALE, to commence in, and be deduced from, the persons who should be the *heirs* of the ancestor.

In the case of *Allgood v. Withers*, it was clear, that the heirs of the bodies of *W*, *G*, and *M*, were *all* to take an interest of the same sort ; and that the persons who should be the heirs of the bodies of *G* and *M*, were to have A FEE, was equally clear from the words of superadded limitation ; while to have construed the limitation to the heirs of the body of *W*, to have given any interest to *their* ANCESTOR, would have been to *create an intail* in him, and to have given to these words a different import from that which they bore in regard to the heirs of the body of *R* and *M*, and to have rejected the superadded words of limitation as having no meaning, so far as they related to the heirs of the body of *W*.

In *Archer's* case, the father of the next *heir male*, would have taken an estate in tail male, had the rule been applied to the gift ; while the words of limitation were to the *heirs* male of his next heir male ; and from this expression it was manifest, that the words *next* heir male were used in designation of a *particular* person ; of the person in whom the description of *heir male* should be first fulfilled ; and that the words *and to his heirs*, &c. were words of limitation, ascertaining the duration of the interest, or continuance of the estate he

was to have ; an estate which was not equally extensive with that which would have passed under the construction, that the father of the next heir male had an estate tail ; for an estate in tail male in the father would have entitled all his sons and their male issue to have been inheritable ; while the words of the devise confined the estate to the next heir male and his HEIRS MALES, and, consequently, excluded all the other sons and their descendants. In the case of *Waker v. Snow*, the words "*right heir male*," and in the case of *Lisle and Gray*, the words "*heirs males*," as appeared by the context, were clearly used in the same sense : in the *first* of these two instances, as the *seventh son*, and in the *second* of these instances, as *every OTHER son after the fourth*, in succession, according to the priority of his birth ; and the superadded words of limitation, engrafted on the words used in designation of the persons, and as declaratory of the order of succession, expressed the meaning of the parties, in a manner and in terms which did not leave any room for doubt on the intention. In *White and Collins (v)*, the limitation to the heir in express terms, for *a definite* period of time, clearly demonstrated an intention, that the *heir* should take *as a PURCHASER* in his own right, and for a PARTICULAR estate. As he was not to have the *inheritance*, the terms of the rule do not comprehend a case of this description. This case arose on a devise in

a will, but it is apprehended that a similar case, arising on a *deed*, is open to the like observations, and to be determined by the same rules of law and of construction. It is the particular circumstance under which the limitation is penned, and not the nature of the instrument, which precludes the application of the rule.

Perhaps a gift by deed to a man for *life*, remainder to his HEIR in the *singular* number, with words of superadded limitation and procreation, so as to create an intail, will form another exception; partly, indeed principally, on the ground that the word HEIR in the *singular* number, cannot, IN DEEDS, be considered as describing the whole class of legal and inheritable successors.

And it has been noticed and instanced by the case of *Shelley*, that the rule applies, though to the words heirs males of the body, other words of limitation, seeming to import a class of *persons as THEIR SUCCESSORS*, are added. The rule also applies, though, between the several limitations to the ancestor and his heirs, or heirs of his body *in deeds*, there is interposed an estate to *trustees* to support *contingent* remainders, and there are not any contingent remainders to be supported, unless the limitation to the *heirs* be construed to give an interest of that sort (*x*). The rule applies also, though there

(*x*) *Hodgson and Wife v. Ambrose*, *supra*; *Coulson v. Coulson*, 2 Stra. 1125; 2 Atk. 246.

are other provisions; as that the tenant shall not be impeached for waste, or, which is the same in effect, that he shall be DISPUNISHABLE FOR WASTE; or shall have a power of leasing, &c.; a power for which there cannot be any occasion, unless the intention of the parties be, that the ancestor shall be merely tenant for his life, and the limitation to his *heirs* give an interest TO THEM originally, in their own right, and as purchasers.

In wills, the rule applies generally, and without exception, to the several limitations, as often as the gift to the *heirs* is without any expression of qualification, restriction, or description, to show that the word heir, or heirs, was used in designation of *some particular person*, or several individuals, or a class of persons; or that word does not, in fact, nor in intention, comprehend all the objects within the extent of this term, in its general, technical, and strict legal signification.

Neither the express declaration,

- 1st, That the ancestor shall have an estate for his life AND no longer (*y*); nor,
- 2dly, That he shall have *only* an estate for life in the premises, and that, after his decease, it shall go to his heirs of his body, and, in default of such heirs, vest in the person next in remainder; and that the ancestor shall have no

(*y*) *Robinson v. Robinson*, 2 Ves. 225; 5 Bro. Par. Ca. 278.

power to defeat the intention of the testator (z); nor,

3dly, That the ancestor shall be tenant for his life and NO LONGER, and that it shall not be in his power to sell, dispose, or make away with any part of the premises (a); nor,

4thly, A provision that the ancestor shall not be impeached for waste; nor,

5thly, That he shall have a power of leasing or jointuring; nor,

6thly, The interposition of an estate to trustees to support contingent remainders (b); nor a direction that the heirs shall take SEVERALLY and SUCCESSIVELY, as they shall be in PRIORITY OF BIRTH; every elder and the heirs male of his body to be preferred to every younger; will change the word *heirs* into words of purchase (c).

Nor will a gift to two, as tenants in common, with a limitation to their heirs, &c. equally to be divided (d);

Nor a gift to A and the *heirs of her body* lawfully to be begotten, for ever, as *tenants in*

(z). *Thong v. Bedford*, 1 Brown's Ch. Ca. 313.

(a) *Hayes v. Foorde*, 2 Black. Rep. 698.

(b) *Hodgson and Ambrose*, and *Coulson and Coulson*, *supra*.

(c) *Legate v. Sewell*, 1 P. W. 87; see also *Jones and Morgan*, 1 Brown's Ch. Ca. 206; 7 Brown's Par. Ca. 130; *Miller v. Seegrave*, *Robinson's Gavelkind*, 96; *Fearne*, 179.

(d) *Thrustout v. Peake*, Str. 12.

common, and not as joint-tenants; and in case she shall happen to die before twenty-one, or without leaving issue of her body lawfully begotten, then to others (e);

Nor a gift to A and the heirs of her body lawfully to be begotten, *whether sons or daughters*, as tenants in common, and not as joint-tenants; and in default of such issue, then over (f);

Nor will the word first, next or eldest, subjoined to the word heir in the singular number, or to the word heirs in the plural number, be sufficient of itself, for this purpose, UNLESS ATTENDED WITH WORDS OF ENGRAFTED LIMITATION, clearly showing that particular persons were in the contemplation of the parties, and singly and individually, the objects to be ascertained under the description of heirs of their ancestors. (g).

Without such special indication of intention, this word of reference will, in construction of the words heirs, &c. be UNDERSTOOD to mean nothing more, than that the person who, for the time being, shall be *the* FIRST in the line of succession, is the object to be preferred, and the person designed to take under these words.

Nor even in wills will words of *superadded limitation*, though accompanied by the word *first*, &c. *always* render it necessary to construe

(e) *Doe v. Smith*, 7 T. Rep. 531.

(f) *Pierson v. Vickers and Wife*, 5 East, 548.

(g) *Whiting and Wilkins*, 1 Bulstr. 219; 1 Roll. Abr. 836; *Trollope and Trollope*, Amb. 453; Rob. Gavel. 96; 1 Vent. 230.

the word heirs, in the first instance, to be words of designation or purchase (*h*).

That the word heirs may have this construction, the words of *superadded limitation must vary*, and be wholly inconsistent with, the line of SUCCESSION *imported by the first mention of heirs*, as in the several cases already noticed. In *Wright and Pearson* (*i*), a devise was in trust for *A* for life, remainder to trustees to support contingent remainders, remainder to the use of the *heirs male* of *A* and their *heirs*: and in *Goodright v. Pullyn* (*k*), a devise was to *N* for life, remainder to the *heirs male* of his body lawfully to be begotten, and his heirs for ever; and it was held, that the *several devisees* took estates-tail, under the limitation to *their heirs*; and, of course, the words heirs, &c. were construed to be words of limitation: and in the case of *King and Burchell* (*l*), the devise was to *I H* for life, remainder, after his death, to the *issue male* of his body, and to *their heirs*; and for want of SUCH ISSUE, to *W R*, his heirs and assigns for ever: and Lord Keeper *Henley* determined, that *I H* took an estate-tail, and that a proviso for imposing a charge on the estate, in favor of the person *next in remainder*, in case of alienation, &c. by *I H* OR HIS issue

(*h*) *Minshull v. Minshull*, 1 Atk. 411.

(*i*) *Ambl.* 358.

(*k*) 2 Lord Raym. 1437; and *Minshull v. Minshull*, 1 Atk. 411.

(*l*) *Ambl.* 379; *Frank v. Stovin*, 3 East, 548. S. P.; *Roe ex dem. Dodson v. Grew*, 2 Wils. 322.

male, or (they, as well as the issue male, being named to take under limitations of other property,) *issue female*, was void.

The difference between these cases, and others which, on a first impression, appear to be similar in their circumstances, may, with a little attention, assisted as that attention will be, by a reference to the principles and grounds of the several determinations, be easily discovered.

On the reason which influences the determination of these cases, some notice has already been taken in different parts of this Essay.

That the word *heirs*, in reference to limitations of legal estates, may be a word of purchase, even in a will, it must, in terms, be explained to be of the same import with the word *children*, and used to describe them, without extending to the whole line of successors.

Or they must be used and be interpreted in this sense, or otherwise cannot have any effect, according to the intention with which they are introduced into the will.

Or they must be used to describe a particular person, or several persons, or a class of persons.

Or they must engraft a new order of succession, by giving an inheritable interest to be derived from this person, these persons, or this class of persons.

Or they must be used as ascertaining a person already in existence; giving an estate to him immediately.

Or because, from the context, it may be

collected that no intail was intended to be created (*m*).

Thus in *Lowe v. Davies*, a devise was to *B* and his heirs lawfully to be begotten; that is to say, to his *first*, second, third, and every other son and sons successively, lawfully to be begotten, of the body of the said *B*, and the heirs of the body of such first, second, third, and every other son and sons successively lawfully issuing, as they should be in seniority of age and priority of birth; the eldest always, and the heirs of his body, to be preferred before the youngest and the heirs of his body.

And in *Doe v. Laming*, the devise was to *A* and her heirs of her body, lawfully begotten, or to be begotten, as well females as males, and their heirs and assigns for ever, to be equally divided between them, as tenants in common, and not as joint-tenants (*n*).

And in *Archer's* case, the devise was to *A* for for life, remainder to the next heir male of *A*, and to the heirs male of the body of such next heir male.

And in *Burchett v. Durdant*, the devise was to *A* for life, without impeachment of waste; and after the decease of *A*, then to the heirs male of the body of *A* NOW LIVING (*o*).

And in all these cases, the persons designated as heirs, took by purchase.

(*m*) *Doe v. Goffe*, 11 East, 668; *White and Collins*, Com. Rep. 289.

(*n*) *Doe v. Laming*, 2 Burr. 1100; 1 Black. Rep. 265.

(*o*) *Burchett v. Durdant*, 2 Vent. 311; 2 Lev. 232.

It is true, that one of the reasons assigned by the Court for its determination of the last noticed case was, that the several limitations gave interests of different sorts, one a legal, the other a trust estate ; but it is also clear, that the Court thought the case warranted a determination on the grounds expressed in this Essay.

There are other cases which have been decided on some or one of these grounds of exception.

Thus, in *Goodright v. Herring (r)*, a devise was to *A* for life, remainder to trustees for his life, to support contingent remainders, remainder to the heirs males of the body of *A* to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth ; the elder of *such sons* and the heirs male of his body lawfully issuing, being always preferred and to take before the younger of *such son and sons* and the heirs male of his and their body and bodies ; and for want and in default of such issue, then to the use of and in trust for all and every the *daughter* and daughters of the body of the said *A B* to be begotten, to be equally divided amongst them, if more than one, share and share alike, to take as tenants in common, and not as joint-tenants ; and of the several and respective heirs of the body and bodies of such daughter and daughters, with limitations over.

On account of the words of explanation, and the use of the words sons and daughters, the devise in favor of the heirs male was ruled to be a devise to the first and other sons; and by reason of the superadded words of limitation, the sons took successive estates in tail male.

In *Doe v. Ironmonger* and others(s), the devise was to *George Hayes* and his heirs, to receive the rents and pay them for the maintenance and support of *Sarah Clay*, (a married woman) and the issue of her body lawfully begotten, during the natural life of *Sarah Clay*; and after the decease of *Sarah Clay*, then upon trust for the use of the heirs of the body of the said *Sarah* lawfully begotten or to be begotten, their heirs and assigns for ever, without any respect to be had or made in regard to seniority of years or priority of birth; and in default of such issue, to another person in fee. It was ruled, that all *Sarah's* children were joint-tenants in fee; as they were intended to take together, without regard to seniority of age or priority of birth.

But this case did not call for the application of the rule in *Shelley's* case, since the ancestor's estate was equitable.

A devise was to one for life, remainder to his first son during his life, and to preserve; and after his decease, in trust for the several heirs male of such first son lawfully issuing, so as the elder of such sons and the heirs male of his body should

always be preferred and take before the younger and the heirs male of his body; and for want of such issue, in trust for the second, &c. for life, and the several heirs male, &c. the elder, &c. And on the context it was decided, that the eldest son was tenant in tail (r).

But there are cases in which, notwithstanding words of explanation, the word heirs has been held to create an estate-tail in the ancestor.

Thus in *Pierson v. Vickers* (s), a devise was to *Ann Vickers* and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common, and not as joint-tenants, with a limitation over, in default of such issue.

And it was decided, that *Ann Vickers* took an estate-tail.

Two circumstances are material; 1st, the gift was to *Ann* and the heirs of her body, by one entire and connected clause; and 2dly, and this is more important, there were not any words of superadded limitation, so that the sons and daughters, as purchasers by that name, could have taken the inheritance. The general intention governed this decision.

So in *Doe d. Candler v. Smith* (t), although the devise was to *A* and the heirs of her body for ever, as tenants in common, and not as joint-tenants, with a limitation over, in case *A* died before twenty-one, or without leaving issue of

(r) *Poole v. Poole*, 3 Bos. & Pull. 620.

(s) 5 East, 548.

(t) 7 T. Rep. 531.

her body: yet it was held, that *A* took an estate-tail by force of the gift to the heirs of her body.

This case turned partly on the general intention, and partly on the absence of words of superadded limitation, to mark a line of succession. This case is to be contrasted with *Doe ex dem. Davy v. Burnsall* (*u*).

In that case, the gift was by will to *A* and the issue of her body, as tenants in common; if more than one; but in default of such issue, or being such issue, if they should all die under twenty-one, and without leaving issue of any of their bodies, then to another person: and yet *A* took for life only, and the children, under the name of issue, took the fee as purchasers. The fee vested in them by reason of the limitation over, which showed that the estates of the issue were to determine only by death under twenty-one.

In *King v. Burchall* (*x*), and in *Frank v. Stovin* (*y*), the devise was to one for life, remainder to his issue male and to their heirs, share and share alike; and for want of such issue, then over: and yet, notwithstanding the words of superadded limitation, and the words of regulation and modification, the ancestor took an estate-tail.

A more minute examination and contrast of this class of cases will be found in the chapter on Estates-tail.

(*u*) 6 Term. Rep. 30.

(*x*) Ambl. 379.

(*y*) 3 East, 548.

And in *Doe v. Goffe* (*a*), the devise was to *A*, and the heirs of her body, as tenants in common, but if such issue should die before he, she, or they should attain the age of twenty-one, then to the testator's son *B*, in fee; and it was decided, that *A* was only tenant for life, with remainder to her heirs of her body, considered as children, as tenants in fee, by implication, subject to a limitation over by executory devise.

Gretton v. Hayward (*b*) is referrible to the same ground; namely, the absence of intention to intail; and the adequacy of the gift to pass a fee.

However, in *Henry v. Purcell* (*c*), the devise was by way of trust to *A* for life, and for her separate use; and after her decease, to the use of the heirs of the body of the said *A*, lawfully issuing; the elder of such issue, and his, her or their heirs, to inherit and take place before the younger of such issue, his, her and their heirs; and the elder daughter was preferred to the younger, and became tenant in tail by purchase.

In this instance, the gift to the heirs was independent of the rule, and therefore it presents an authority for the construction of such a gift, as different from a simple gift, to the heirs of the body, as such, without any words of regulation or modification.

From all the cases this corollary may be drawn; that the ancestor will always take an estate-tail under a gift to him for life, with

(*a*) 11 East. 668. (*b*) 6 Taunt. 94. (*c*) 2 J. Black. 1002.

remainder to his heirs of his body, with or without words of superadded limitation, or with or without words of regulation; unless the heirs of the body can, consistently with the general intention, be purchasers, and take either an *estate-tail* or an estate *in fee*, in their own right.

The sound rule of interpretation to be adopted in these cases, is that which takes the *context* for its guide, and which consults the general *intention* (*d*), and endeavours to give it effect; and the result will be, that when the words heirs of the body are, on a sound interpretation of the will, found to be used in a collective sense, as descriptive of *issue* collectively; they are to be construed in their genuine and legal sense, and as words of inheritance or succession. On the other hand, where the words heirs of the body are used in a limited and confined sense, and as descriptive of *children* or issue in the *first degree*, or issue or children of a *particular denomination*, they are words of purchase.

In wills, the object to which the Courts give particular attention, aiming to ascertain the general intention, and to carry that object into effect, will always render it essential to inquire whether there was any intention to intail, and who was to be the donee in tail; and the donee under the gift for life will have an estate-tail, or for life, according to the result of that inquiry.

(d) 7 Term Rep. 533.

In many cases he will take an estate-tail, to effectuate the general intention; since any other construction would not, either from the absence of words of superadded limitation, or from some other cause, accomplish that intention.

It may also be remarked, that mere words of perpetuity or regulation, added to a devise to a man and his heirs of his body lawfully begotten, will not turn the words descriptive of the heirs, into words of purchase. Thus, a devise was to *A*, and the heirs of her body lawfully to be begotten, *for ever*, as tenants in common, and not as joint-tenants; and in case she should happen to die before twenty-one, or without leaving issue of her body lawfully begotten, then to another person; and it was held, the parent took an estate-tail. This case is by modern decisions become questionable.

To support this last case, the words *for ever* were rendered of no particular import; and the words of modification or regulation of the tenancy were disregarded, and the limitation over was considered as a remainder vested or contingent; and the words, without leaving issue, as referrible to an indefinite failure of issue.

Modern judges (*dd*) seem to have discovered another and more consistent construction of the words, and under that construction the children would be tenants in common, in fee subject to a limitation over, by way of contingent re-
(*dd*) *Gretton v. Hayward*, 6 Taunt. 94; *Doe v. Goffe*, 11 East, 668.

mainder, in one event, and executory devise, in another event.

In proposing the instances of exception to the rule, the grounds on which the excepted cases received the construction affixed to them, and to which similar cases are entitled, are expressed in a manner which supersedes the necessity of any comment on each particular case.

It remains, however, to point to the circumstances by which the case of *Lowe v. Davies* is to be distinguished from *Legate* and *Sewell*, and *Jones* and *Morgan*; since between these cases there is some resemblance, though in practice they stand as opposed to each other; furnishing lines of distinction.

In *Lowe v. Davies*, the testator explained the meaning he imposed on the word heirs, in the sense he used that word. He declared, that he meant that the heirs should take severally and successively, according to the priority of their birth; he also in terms directed that they should take under the names of his *first* and other sons, and not under the *general* and *collective* term of his heirs, and added a limitation to the heirs of those persons. In this case the construction did not depend on the technical sense of the words heirs of the body (*e*), but on the particular meaning the testator himself had annexed to them, and which he in terms had declared to be the same in sense as his

(*e*) See 7 T. Rep. 533.

first, &c. sons ; while in the cases of *Legate* and *Sewell*, and *Jones* and *Morgan*, the construction rested merely on the direction that the heirs should take *severally* and *successively*, and there was not any such direct explanation of the meaning of the words heirs of the body, as showed that the testator used them in any other than their technical sense, and as embracing, *uno flatu*, the class of persons who should successively answer the description of all possible heirs.

In wills, let it be remembered, the word *issue* may be a *word of limitation*, and, connected with an estate of freehold in the ancestor, may give an estate-tail to him (*f*). But the word *issue* is not, *ex vi termini*, within the rule in *Shelley's* case. It depends on the context whether it will give an estate-tail to the ancestor (*g*).

In deeds, operating by way of *conveyance*, it is *always a word of designation*, descriptive of the *persons* who are the objects of the gift ; and is never construed to be a word of limitation. It is a word of less determinate meaning than the words *heirs of the body* ; and, in wills, depends for its construction more on the intention of the Testator, than on the strict rules of law. As often as it is used generally, as *extending to issue, from generation to generation*, it is, with the exception noticed in a future page, and instanced by *Glenorchy v. Bosville*, (a case on

(*f*) *King v. Melling*, 1 Ventr. 214, 225.

(*g*) *Doe v. Collis*, 4 T. R. 294.

executory trusts (h), a word of limitation, and will give the ancestor, taking an estate of *freehold*, AN ESTATE-TAIL; for as the word *issue* is introduced in this collective sense, it receives the same construction as the word *HEIRS OF THE BODY* would have done.

On the other hand, if it be applied with a meaning which makes it synonymous with children, and *this appears from superadded and uncontrolled words of limitation, descriptive of an order of succession, different from that imported by the limitation* TO THE ISSUE: as to *B* for life, *sans waste*, and in case he should have an issue male, then to such issue *male* and *his heirs* for ever (*i*); or from words of restraint, showing that the ancestor is to have only an estate for life, and superadding words of limitation on the *gift to the issue*; as to one for life *only*, and after his decease to the *ISSUE MALE* of his body, and the heirs male of the body of such issue (*k*); it will be a word of purchase.

In the case of *Backhouse v. Wells*, the restrictive word "ONLY" determined the construction.

For in another case, subsequent in point of time, a devise was to one during the term of his natural life, and from and after his decease, to the use of the *ISSUE MALE OF his body* law-

(*h*) *Supra* and *infra*.

(*i*) *Loddington and Kime*, Lord Raym. 208; 1 Salk. 224.

(*k*) *Backhouse v. Wells*, 1 Eq. Abr. 184; and see the note to that case.

fully begotten, and the HEIRS MALE OF the body of such *issue male*, and for want of such issue male, remainder over (1); and it was determined in the Court of *Common Pleas*, that the ancestor took an ESTATE-TAIL; and one judge said, he thought too great regard had been paid to the words heirs male of the body of such *issue*.

The only possible difference between the cases of *Backhouse v. Wells*, and *Dodson and Grew*, that can make them distinguishable from each other, and be understood as contrasted authorities, is, that in the former of these cases the word ONLY was added to the limitation for life, and expressed an intention that the estate of the person, taking under that limitation, should be confined to this exact period; and that in *Dodson v. Grew* there was not any such addition, nor the addition of any other word of DECLARATION, beyond the words of express limitation.

Whether such declaration ought to be decisive, is submitted to the reader. The writer of these observations cannot do less than add, he thinks the question, in cases of this sort, depends rather on the inquiry, whether the *issue are to have the inheritance, quatenus they are the heirs, and as a class of persons, than whether it is the intention that the ancestor should have an estate for life only, and not an estate of a greater extent*.

(1) *Dodson and Grew*, 1 Wils. 322; 7 Term Rep. 533.

It is also observable, that the case of *Dodson* and *Grew* was decided, and has frequently been recognized as law, and its authority enforced, for the purpose of giving effect to the general intention of embracing *all the* ISSUE within the extent of the devise, in *preference to a particular* intention, which, if literally observed, would, for want of cross-remainders, eventually admit those in remainder into the enjoyment of the estate, in exclusion of some of the issue, who, in reference to the particular intention, were the primary objects of the testator's bounty (*m*).

Limitations of trusts which are executed (*n*), are, in deeds and wills, construed by the same rules as similar limitations of legal estates in similar instruments, as often as this can be done, without manifest *violation of the express intention* of the parties. Therefore, generally speaking, limitations of trusts *which are executed, whether contained in deeds or in wills, will receive the same or a similar determination, as, with a view to the different instruments, the like cases would receive, if considered as giving legal instead of equitable interests* (*o*). For the construction on limitations of TRUST estates, is to be the same as on limitations of LEGAL estates (*p*); and the same words which create an estate-tail in a legal estate, will, if applied to an equitable

(*m*) See 7 T. Rep. 533.

(*n*) *Jones and Morgan*, 1 Bro. Ch. Ca. 206.

(*o*) *Bagshaw v. Spencer*, 2 Atk. 583; 1 Coll. Jurid. 378.

(*p*) Tr. Eq. 395. *Legg and Goldwire*, Cases temp. Talb. 20. 2 per Williams 356 and note. 1 Fearn 154.

estate, create an estate-tail in that (*q*); *unless the intention of the author of the trust be apparently and clearly different*, and this is manifested by *plain and direct expression*, exhibiting circumstances; or necessary implication, which point to the mode in which the heirs may take as individuals particularly described, and preclude that construction which would give to the ancestor an estate of *inheritance*.

The mere circumstance,

1st, That the ancestor's estate is for the express period of his life;

2d, To be dispunishable of waste;

3d, To be attended with a *power of leasing*;

4th, That the life interest is to be a separate estate (*r*);

5th, *That trustees are substituted, to support contingent remainders*;

6th, That to the limitation to the heirs of the body, words of limitation to their heirs generally are added; or,

7th, That, in addition to the provisions that the ancestor shall take for life, and that his estate shall be with impeachment of waste, and that trustees, to whom an estate is devised for his life, shall support *contingent remainders*, or without such addition, there are words declaratory that the heirs shall take *severally, respectively, and in remainder*,

(*q*) *Phillips v. Brydges*, 3 Ves. 125, per Master of the Rolls.

(*r*) *Roberts v. Diswell*, 1 Atk. 606; *Hearle v. Greenbank*, 3 Atk. 716; see 3 Ves. jun. 125.

the one after the other, as they shall be in seniority of age and priority of birth (s); or,

8th, That the male shall be preferred before the female, and the elder before the younger (*t*); or,

9th, That the heirs shall take by purchase (*u*), will not prevent the application of the rule; and, of course, the words *heirs, &c.* will be words of limitation, and not of purchase (*x*).

At the same time that these positions are advanced, it must be acknowledged that the case of *Bagshaw* and *Spencer (y)*, (a case which arose on a will, and which was determined by Lord *Hardwicke* contrary to a former determination by the Master of the Rolls,) is, if not over-ruled by the more modern determinations in *Wright* and *Pearson (z)*, *Austen* and *Taylor*, and *Jones* and *Morgan (a)*, an authority, that a provision that the ancestor shall not be punishable for waste, and that an estate is devised to trustees to support contingent remainders, will, of themselves, in the case of a trust executed,

(s) *Jones* and *Morgan*, *supra*.

(t) *Denn ex dem. Creswick v. Hobson* and others, 5 Burr. 2609; 2 Bl. 695.

(u) *Lowe v. Davies*, 2 Lord Raym. 1561.

(x) In his posthumous work, page 330, Mr. *Fearne* was of opinion, that an equitable estate for life, for the separate use of a married woman, may unite with a limitation of the trust for the heirs of her body. The opinion in p. 379 is questionable.

(y) 2 Atk. 577, 246; 1 Ves. 142.

(z) Amb. 368; *Fearne*, 126.

(a) Amb. 376; *supra*.

change the words heirs, &c. in a *limitation* to them, after a limitation to the ancestor for life, into words of *purchase*, and make these words, in the constructive exposition of a court of equity, exercising its controlling power of interpreting instruments, by the presumable intention of a testator, of the same import with limitations to *first and other sons, &c. successively* in tail, in strict settlement.

In delivering his reasons for this determination, Lord *Hardwicke* observed, that the great difference between the present case and that of *Coulson and Coulson (b)*, which was pressed on him as a decisive authority for construing the words heirs, &c. to be words of *limitation* and not of *purchase*, was, that this was a devise of a *trust* in equity; that of a mere *legal* estate; the words of which must be taken as they stand, according to their strict legal determination; that in the case of *Bagshaw and Spencer*, then before the Court, all the limitations were the direction of a trust, which the Court was bound to carry into execution, according to the intention of the testator; and as to the difference urged to him between *trusts executed* and *executory*, he observed, that the distinction had never been established by any *direct decision*, for that *all trusts, in notion of law, were executory*, and to be carried into execution by the Court by *subpœna (c)*.

Since *Bagshaw v. Spencer* was determined,

(b) 2 Str. 1125; 2 Atk. 246.

(c) *Supra*, p. 382.

many cases with similar, and others with stronger circumstances in favour of *the heirs as individuals*, have been the subjects of litigation in the Court of Chancery (*d*); and in no case whatever, of a trust executed, have the words heirs of the body, following a limitation to the ancestor for his life, been held to be words OF PURCHASE, or received any other or a different determination, than the same case, considered as involving questions on limitations of legal estates, would have received.

And it is extremely difficult to show what those circumstances are, which evince such an intention, as makes it necessary to construe the word heirs to be a word of purchase; otherwise than by referring to the cases already introduced, as arising on questions respecting *legal estates*, and determined to have been exceptions to the general rule, under which the word heirs is to be construed a word of limitation.

Even in the report of *Bagshaw* and *Spencer* there are several expressions, from which it appears that Lord *Hardwicke* himself took the distinction between trusts executed and executory; and Lord *Kenyon* (*e*) mentioned a case of *Lloyd v. Jones*, before Lord *Northington*, in which Lord *Northington* said, he conceived Lord *Hardwicke* to have admitted, at last, the difference between trusts executed and executory.

(*d*) *Wright and Pearson*, Ambl. 358; *Jones and Morgan*, 1 Bro. C. C. 206; *Brydges v. Brydges*, 3 Ves. 120.

(*e*) 2 Cox, P. W. 478.

In one case there was,

1st. An executory trust ; and,

2dly. A devise by the same words.

In the former case, the gift was held to be to the first taker for life ; in the latter, for an estate-tail.

Let it be remembered, that the cited case of *Algood and Withers (f)*, arose on a deed of conveyance to trustees, of some lands in fee, and of other lands for the residue of a term, upon trust for *W* for life, remainder to the heirs of the body of the said *W*, and of *G* and *M*, and their heirs, executors and assigns ; and it would seem that the consideration of the circumstances, that the limitation to the heirs of *W* was made to them, and the heirs of *G* and *M* jointly, so that all the *heirs of the several persons were to take an interest of the SAME SORT*, and that the heirs of the body of *G* and *M* were to take an estate in fee, as appeared by the *words of superadded limitation*, and that the limitation to the heirs of the body of *W*, construed as words of limitation, would have given an ESTATE-TAIL, ruled the determination of this case.

Trusts *executory (g)* are peculiar to *marriage articles*, and those instruments, whether deeds or wills, in which, by the express provisions of the instrument, the *trustees* are to *convey, settle, or assure* the lands, on which the instrument is

(f) P. 359.

(g) 1 Fonbl. 408 ; Cox's Notes to 2 P. W. 477 ; 2 Ves. & Beames, 369.

to operate, or to *purchase* land with money entrusted to be laid out in a real estate; *thereby showing that the parties have a further conveyance in their prospect and contemplation (h)*.

The mere circumstance that the party covenants to do an act, or directs a conveyance to be made, will not, of itself, make the trust executory.

The conclusion that a trust is *executed* or *executory*, must depend on the *quo animo*; on the inquiry, whether another instrument be in the contemplation of the party, as the act which is to give full and complete effect to the principal object he has in view; Children as purchasers are always understood to be the main objects of *marriage articles*, and also of deeds, and even, except as is afterwards noticed, wills, directing (*i*) that lands to be purchased, or lands of which the testator is the owner, shall be settled or conveyed; unless the settlement or conveyance is to be made, with reference to particular uses, or upon trusts (*k*), and the legal operation and effect of the uses and trusts are already fixed. When the uses and trusts are already ascertained, the trust is not considered as *executory*. That point was decided in *Roe v. Aistrop* (*l*), and in *Austen v. Taylor*; and particularly in the latter of these cases, and the recent case of *Brouncker v. Bagot* (*m*).

(*h*) Difference between a limitation to heirs of the body of a man by his wife, and generally, *Read v. Ward*, 7 Vin. Abr. 123.

(*i*) *Bastard v. Proby*, 2 Cox's Rep. 6.

(*k*) *Brouncker v. Bagot*, 1 Mer. 271.

(*l*) 2 Black. Rep. 1228; *Tracey v. Lethulier*, 3 Atk. 794.

(*m*) 1 Meriv. 271.

That a trust will not be executory merely because the party covenants to *do an act*, is a distinction *clearly* deducible from all the cases on this learning, and is particularly illustrated by an instance in fact, and a decision on the question, in *White and Thornborough* (n). Indeed, the cited cases of *Roe* and *Aistrop*, and *Austen v. Taylor* (o) are also authorities for the like conclusion.

In *Roe v. Aistrop* a settlement was made by the husband previous to marriage, of his freehold estates, to the use of himself and his intended wife, for their lives and the life of the survivor, and, after their decease, to the heirs *of the body of the settler*, on the body of his intended wife to be begotten, with remainder to his own right heirs; and in that settlement, he *covenanted* to surrender his *copyhold* lands, which were of inheritance, descendible by the custom of the manor to the youngest son, to the use of himself and his intended wife and their heirs of their two bodies to be begotten, *in like manner*, and to the *same uses*, as the freehold lands thereinbefore mentioned were settled and conveyed; and, after the marriage, he surrendered the copyhold lands to the use of himself and wife for their lives and the life of the survivor of them, and after their several deceases, to the use of the heirs of their two bodies, and for want of such issue, to the use of

(n) Ambl. 376; 2 Vern. 702.

(o) See also *Tracey v. Lethulier*, 3 Atk. 794.

himself in fee. *De Grey*, Ch. J. said it was a mighty clear case; and all the Court agreed, that as the covenant for the surrender of the copyhold *referred to the uses declared of the freehold*, the word heirs in the article, could not be considered as a word of purchase, but must have its legal operation, according to the effect of that word in the limitation of the freehold lands.

In *Austen v. Taylor (p)*, a testator, after giving certain lands to trustees and their heirs, among other trusts, upon trust for *P* for life, remainder to trustees *to preserve*, &c. remainder to the heirs of the body of *P*, remainder to his own right heirs; gave the residue of his personal estate to trustees, in trust to buy lands in fee-simple; which he directed should remain, continue, and be, to, for, and upon *such* and the *like estate* and estates, trusts, intents, and purposes, and under and subject to the like charges, restrictions and limitations, as were by him before devised, limited, and declared, of and concerning his *land* and premises thereinbefore last devised, or as near thereto as might be, and the deaths of persons would admit: and the Lord Keeper was of opinion, that *in the case of imperfect trusts only, that Court could make a different construction from a legal limitation*. In that case, he said, there was no *reference to the trustees*. Without that ingredient, he did not

(*p*) *Ambl.* 376; and *Brouncker v. Bagot*, 1 *Merr.* 271; but see *Papillon v. Bois*, 1 *Eq. Ab.* 185.

find any case where the Court had given a different meaning from what a court of law would on a legal limitation. Nothing was left to the trustees to be done, but to buy the land. *The testator had declared the uses of the land when purchased.*

And in *White and Thornborough (q)*, a man with a view to his intended marriage, and as a mode of conveyance, covenanted to levy a fine of freehold lands, and to surrender copyhold lands, to the use of himself for life, remainder to his wife for life, remainder to his heirs males of his body by his wife, remainder to the heirs of their two bodies, and omitted to levy the *fine* or make the surrender ; and Lord *Harcourt*, on a rehearing, after a former hearing by him, in which he had considered the covenant as executory, and to be construed in the same manner as marriage articles, declared, that the covenant to levy the fine and declaring the uses thereof, was to be considered, *not as articles* but as a *defective settlement*, and, in that Court (the Chancery) to be of the same effect, as if the fine had been levied, and the surrender made ; and that the uses were to be construed as in a perfect and complete settlement, and not to be varied or altered.

In construing marriage articles, and such other instruments as are *directory*, particularly deeds or wills, providing for a conveyance to be

(q) 2 Vern. 702.

made (*r*), or ordering money to be laid out in the purchase of lands (*s*), the *end* and *consideration* of the articles or other instruments, and the intent of the trusts, are to be regarded (*t*); and in articles, *not followed by a settlement previous to the marriage*, or if there be a previous settlement, though the settlement purports, in terms, to be in *pursuance* and *performance* of the *articles*, the limitation to the heirs will not be the subject of this rule, if the application of the rule would give to the ancestor an estate-tail, and enable HIM ALONE, SOLELY, and by himself, to alien the inheritance to the prejudice of his children (*u*); *for, in marriage articles, the unborn children are considered as purchasers for a valuable consideration, and the very objects of the intended settlement (x)*; and since a settlement which leaves the estate wholly in the *power of the settling parent, would be nugatory*, the Court of Chancery, *merely from the nature of the provision (y)*, construes the words of limitation to the *heirs of the body, to*

(*r*) *Trevor v. Trevor*, 1 Eq. Abr. 387; 2 Brown's Par. Ca. 122; *Streatfield v. Streatfield*, Ca. temp. Talb. 176; *Cusack v. Cusack*, 1 Brown's Par. Cas. 470; *Nandick v. Wilkes*, 1 Eq. Abr. 393. C. 5; Gilb. Eq. Rep. 114; *Per Buller*, 2 Term Rep. 252.

(*s*) *Jones v. Langton*, 1 Eq. Abr. 392.

(*t*) *Bastard v. Proby*, 2 Cox, P. W. 478. and MSS.

(*u*) *Honor v. Honor*, 2 Vern. 658; 1 P. W. 125; *West v. Errissey*, 2 P. W. 349; 3 Brown's Par. Ca. 327.

(*x*) *Per Buller*, in MSS.

(*y*) *Streatfield v. Streatfield*, *supra*.

mean the children of the marriage and THEIR HEIRS (z); ordering the limitations in the settlement to be to the *first* and other sons in tail, with remainder to the daughters as tenants in common in tail, with cross-remainders among the daughters in tail; and interposing estates to trustees to support contingent remainders; or ordering the limitations to be less comprehensive; or to vary in terms and in extent of operation, according to the words, descriptive of the heirs.

Articles carried into execution by a settlement previous to the marriage, without *any reference* by the *settlement* to the *articles*; and also those limitations in articles, which will have the effect to exclude the settling parent from the power of barring the intail, without the *concurrence of the other* parent; and those articles also, which, after making a provision for some issue of the marriage, as *sons*, by the name of *sons*, (giving them estates-tail,) and securing portions to the daughters, contain limitations to the heirs of the body; and those articles also, which, by a CHANGE OF EXPRESSION (a), in different classes of limitation, show that the settling party makes a distinction between the words *first* and other *sons*, and the words *heirs of the body*, or even uses the words heirs of the body differently, in different

(z) *Roberts v. Kingsley*, 1 Ves. 238.

(a) See *Orgood v. Strode*, 2 P. W. 256, *contra*, or, at least, an exception.

clauses of the same instrument ; are not within the reason, nor objects of the exception.

In those instances in which the settlement is *previous to the marriage*, without *any reference* to the articles, the settlement cannot be controlled by the *articles*.

Some have supposed that relief is withheld on a presumption of a change of intention (*b*) ; but it seems rather on the ground of want of jurisdiction in the Court of Chancery, that the settlement is allowed to have its legal operation.

And it has always been thought a sufficient and very prudent provision for the *issue*, at least the occasions, of the *intended marriage*, when the settlement proceeds from the husband, that the limitations should give *estates*, which, though they are of inheritance, do not confer a power of alienation, *which can be exercised without the concurrence of the husband and wife* (*c*) : so that neither the *husband alone*, in the life-time of his wife, or *either* of them after the death of the other, *can disinherit the issue*.

On this ground, as often as the limitations in their *legal import*, would entitle the ancestors to interests or estates of this description, the Court of Chancery has declined to interfere, or interfering, has allowed to the limitations pre-

(*b*) *Legg v. Goldwire*, Cas. temp. Talb. 20.

(*c*) 7 Ves. 390.

cisely the same effect as they would have had in a conveyance giving legal interests. Therefore, in those instances in which the tenor of the articles is, that the estate *of the intended husband*, or an estate *by his provision*, according to the statute of 11 Hen. VII. (under which statute he must convey the estate, or procure the same to be conveyed, or the same must be purchased with his money) (*d*), shall be so settled, that the *wife alone* shall have an estate-tail; as to the use of the intended husband for his life, remainder to his intended wife for her life, remainder to the *heirs of the body of the intended wife*, by her intended husband; (as was the form of the limitations in *Honor* and *Honor* (*e*), and *Whately v. Kemp* (*f*);) or so that the *inheritance* shall be a *contingent interest* to each parent, and can never vest in the parent to whom it is limited; as to the use of the husband for life, remainder to the use of his intended wife for her life, and after the deceases of them both, to the use of the *heirs of her body* by him, *if he survived her*, and if *she survived him*, to *his heirs of his body*, on her body to be begotten, remainder to his own right heirs; as was the case of *Highway* and others v. *Banner* and others (*g*); the Court of Chancery will NOT VARY or alter the words of limitation; but will suffer them to be inserted in the

(*d*) 1 Vol. of Conveyancing, p. 19. 146.

(*e*) 1 P. W. 123.

(*f*) Cited in 2 Ves. 358.

(*g*) 1 Brown's Ch. Ca. 584.

settlement, and have their full legal import and construction.

Honor v. Honor arose on articles for a settlement by the husband, of freehold lands of which he was seised. *Whateley v. Kemp* arose on articles for the settlement of freehold lands, to be purchased with his money; and *Highway v. Bonner* originated in articles by the owner of a customary freehold, to settle his customary tenement, held by copy of Court Roll. The two first of these cases clearly turned on the mere circumstance, that the *wife alone* was to have an estate of inheritance in lands of the provision of the husband, and therefore, it would not be in the power of the husband alone, or of his wife in his life-time, without his consent (*h*), or after his death, without the consent of the *heir in tail*, or of the person next in reversion or *remainder*, to discontinue the estate-tail, or make any alienation to the prejudice of her issue, the remainder-man, or reversioner.

The distinguishing circumstance of the last of these three cases is, that the inheritance was limited, so that it could not *possibly* vest in either of the parents while alive, but was necessarily to remain in contingency, as long as both the parents should be living, and was to vest only after the death of such *one of them* as should first depart this life, and was then to vest in the heirs of that person, as his descend-

(*h*) Cro. Jac. 474; 1 Convey. 19.

ants; so that *neither of the parents* would, singly and alone, *ever have* a certain and absolute power of lawful alienation, though the limitation to the *heirs*, was to give the inheritance as a *contingent interest* to ONE OF them.

From these three cases the conclusion is, that in the two former, the wife alone, to whom the inheritance was limited, and in the latter, the husband or wife, (to one or the other of whom the limitation was, on the contingency that the person who was to have the inheritance should *die* in the life-time of the other) had not any *such* estate as would confer a power on that person *singly* to make any alienation *by way of conveyance*, to the prejudice of the issue.

It is in cases of this description only, and in no others, that limitations to the heirs of the body, as providing for *all the issue* of the marriage, are, in articles for a settlement, construed to entitle the ancestor to the inheritance.

Had the limitation in the articles to the heirs been in such form, that, according to the legal construction of the words of limitation, *either* of the parents *singly* might, in the life-time, or after the decease of the *other* of them, have lawfully made any alienation, by way of conveyance, to the prejudice of their issue, the Court of Chancery would have held the words to be irregular, informal, and used through mistake, and have ordered a *strict settlement* to be made; and therefore, as often as one of two persons, who are about to intermarry, either the man or woman,

articles to settle land on *themselves jointly*, for a joint estate (*i*), or on *themselves successively*, for several and distinct estates (*k*); and in the articles for a settlement by the *man*, there is to be a limitation to *his* heirs of his body on his wife begotten (*l*), or the heirs of the body of himself and his intended wife (*m*); and by the articles for a settlement by the woman, there is a limitation to her heirs of *her body* to be begotten by her intended husband (*n*), or to the heirs of the body of the intended husband to be begotten by him on her body, or to the heirs of *their* two bodies (*o*), the limitations to the heirs will be construed to have *the first and other sons in view, and the settlement will be ordered to be made*, or if made, reformed, ACCORDINGLY. Since limitations to the heirs in this form would enable the intended husband, alone, in all the instances in which the limitations are to *his heirs* of his body, or the *heirs* of the *bodies* of himself and his wife, and after the death of the husband, would enable the intended wife *alone*, in all the instances in which the articles are for a settlement by her, and the limitations are to *her* heirs of *her* body, by her husband, or

(*i*) *Streatfield v. Streatfield*, *supra*, 392; *Jones v. Langton*, 1 Eq. Abr. 392.

(*k*) *Trevor and Trevor*, *supra*, 392.

(*l*) *Streatfield and Streatfield*, and *Trevor and Trevor*, *supra*.

(*m*) *Cusack and Cusack*, and *Nandick v. Wilkes*, *supra*, 392.

(*n*) *Jones v. Langton*, *supra*.

(*o*) *Burton v. Hastings*, Gilb. Eq. Rep. 113; *Butler's Fearn*, 94. 99. 106.

to the *heirs* of the bodies of herself and her intended husband, to make an alienation to the prejudice of the issue, if the words were allowed the construction they would receive *at law*, the Court of Chancery will interpose its power of correcting the mistakes into which the parties may have fallen, contrary to their contract, and direct the settlement to be prepared with those forms of limitations, which will secure to the children, &c. *certainly* and *effectually*, the provision presumably intended for them.

The distinction that a limitation to heirs, &c. may, in articles, be construed to give to the ancestor the interest imported by that limitation, (when a provision is made for *all the children* of the marriage in some manner or other; for *some* by the names of *sons*; for *others* under the appellation of *heirs*,) is clear from the case of *Powell* and *Price* (*p*), contrasted with the case of *West* and *Errissey* (*q*).

West and *Errissey* was the first case in order of time, and in that case, the articles stipulated to *settle* lands, to the use of the intended husband for life, subject to waste, remainder to the intended wife for life, remainder to the *heirs male* of the intended husband, by his intended wife, remainder to the heirs male of the body of the intended husband by any other wife, remainder to the *heirs female* of the intended husband by his said wife; and leasing and jointuring powers

(*p*) 2 P. W. 535.

(*q*) 2 P. W. 349; 3 Brown's Par. Ca. 327.

were reserved to the intended husband ; and on an appeal to the House of Lords against an order of dismission, made in the Court of Exchequer, it was decreed that the limitation to the *heirs females* entitled the *daughters* of the marriage to an *estate-tail* by purchase; and the most probable grounds of this decision are, that the expression *heirs females* used in the contrasted sense of *heirs males*, did, in marriage articles, call for the same construction in favour of *daughters* as the expression *heirs males* is, in this species of instrument, allowed to have in favour of *sons* ; that both descriptions of persons were, as far as any conclusion on that head could be drawn from the words of the articles, equally in the contemplation of the parties ; and that *no provision was made for the daughters besides that which they could claim under the limitation to the heirs female of the intended marriage.*

In *Powell* and *Price*, the articles provided for a settlement, to be made to the use of the intended husband for life, remainder to the use of trustees for his life, to support contingent remainders ; remainder, as to part, to the use of the intended wife for her life, for her jointure, remainder, as to the whole, to the first and every other son of the marriage successively, in tail male, remainder to the heirs male of the body of the husband, (under which limitation, as in *West* and *Errissey*, sons begotten by him on the body of any woman might have taken,) remainder to the HEIRS of

his body by his intended wife, remainder to the right heirs of himself ; with a power to husband and wife to make leases ; and a provision, that if the husband should die without *issue male*, by his intended wife, and there should be one *daughter*, she should have 3,000*l.* and if there should be *more daughters than one*, they should have 4,000*l.* among them : and these portions were secured on part of the settled lands. And it was resolved, that 3,000*l.* secured to the daughter, the only issue of the first marriage, by a settlement which the husband made on a subsequent marriage (he having, till that time, suffered the provision for the issue of the first marriage to rest wholly on the articles) was an actual satisfaction of all demands under the articles, and that though a limitation by articles to the *heirs male* of a marriage, after an express estate for life to the father, was taken to mean a remainder to the *first* and every other son, it did not follow, that a limitation to the heirs of the body must be equivalent to a remainder limited to daughters ; especially in this case, where they were postponed to the heirs male of the body of the intended husband *by any wife* ; and where there was an express pecuniary provision made for the daughters by the first wife.

It may be added, (and this circumstance makes this case more clearly distinguishable from *West* and *Errissey*.) that no notice was taken of *daughters* contrasted with *sons*, or of *females* contrasted with *males*, as the express

objects of the provision made by the limitations of estates, and that care was taken of the daughters UNDER THAT NAME by a *provision of a different sort*.

That there is an allowed and established distinction between those articles which do, and those which do not, by a change of expression, in the several classes of limitation, show that the settling party makes a difference between the use of the words *first* and other *sons*, and the words heirs of the body; and even between the different use of the words heirs of the body in different clauses of the same instrument, is clear from *Powell* and *Price*, already cited, and from *Chambers* and *Chambers* (*r*), and *Howell* and *Howell* (*s*).

In the former of the two last cases, money in the hands of trustees was articulated to be disposed of in the purchase of lands, to be settled on the intended husband for life, remainder to the intended wife for life, for her jointure, remainder to the *first* and *other* sons of the marriage successively in tail male, chargeable with 2,000*l.* for younger children, remainder to the husband in fee; and, by the same articles, the father of the intended husband, covenanted to settle other lands on his said son and the *heirs male of his body*, remainder to the right heirs of himself, the father.

In the latter of these cases, the articles were

(*r*) Fitzgibbon's Rep. 127; 2 Eq. Ca. Abr. 35. C. 4.

(*s*) 2 Ves. 358.

for a settlement of part of the land, on the husband for life, remainder to the wife for life, remainder, after the death of the survivor, to the heirs of the *body of the wife*; and of other part of the lands, on the husband for life, remainder to the heirs of his body, remainder to the wife. And it was said, in the first of these cases, by Lord Chancellor *King*, that by the articles, those lands which were comprised in the second class of limitation were not intended to be settled, as a provision for the children of that marriage; that the children were taken care of by the other part of the articles; by the trust money; and that it was not like the common case of articles for a settlement on the issue of the marriage, where no *other provision* was made for, or care taken of, them; and that the *different* manner of *penning* the articles in relation to the trust money, and as to *those lands*; the one to be in *strict settlement* to the first and other sons of that marriage, the other to be limited to the husband and his heirs male of his body generally, and not tied up to the *issue of that marriage* (t), showed plainly that the parties understood, and had in contemplation, the difference between a *strict settlement* upon the *issue of that marriage*, and a *general settlement* upon the husband and the heirs males of his body.

In the latter of these cases, it was observed by Lord *Hardwicke*, that there was a *difference* in the *penning* of the two limitations; that on

(t) See *infra*.

the *first*, the parties might have it in view, to leave it in the power, not of the father *only*, but of both to vary ; that on the second, there would be no sense of the limitation, but as the son contended, which was to have the articles carried into execution strictly, to the first and every other son in tail ; that otherwise it would be in the power of the father, by fine, to bar it and defeat all the issue ; that it seemed a strong distinction on the face of the articles ; and that there had been cases adjudged on that distinction ; that as there was a difference in the penning of the articles ; in one (should be, clause) of which they might intend to leave it in the power of the father, in the other not in his power to do it alone, it was a *reasonable* way.

In delivering his opinion on this case, Lord *Hardwicke* cited a case of articles for a settlement, of part of certain lands on the father for life, on the wife for life, on the first and other sons and daughters in tail ; and of other part, on the father for life, and the *heirs male of his body* by his then intended wife ; and stated Lord *Macclesfield* (who decreed to the father in tail, as to the lands comprised in the second class of limitations) to have said, by way of observation on that case, if that had been the sole limitation, he should, without scruple, decree IN STRICT SETTLEMENT, according to the common rule ; but that where the parties had shown they knew the distinction, when to put

it out of the power of the father, and when to leave it in his power, he would not vary the last limitation.

Deeds and wills creating trusts which are executory, and show an intention in the party, that his directions shall not be considered as complete and conclusive, but rather as *minutes*, from which more full and more correct limitations are to be framed, are open to the same observations, and entitled to the same construction; and in these instruments, the *word heirs will receive* the same interpretation as in *executory trusts*, as often as there is any trace of an intention to use this *word*, or, IN WILLS, and *perhaps in deeds too, the word issue, or other substituted word of the same import, as words of purchase.*

In instruments creating executory trusts, the clause for exempting the ancestor from impeachment of *waste*; the insertion of trustees to support *contingent remainders*, or any clause which denies the power of barring the *in-tail (u)*, or any like clause, furnishes evidence of such intention. The case of *Leonard v. Earl of Sussex (x)*, goes still farther; for in that case, the trust was, by one and the same connected clause, to settle on the ancestor *and his heirs of his body*, without any express estate for life, or any other controlling circumstances, besides directions that special care should be taken in such settlement, that *it should never be*

(*) Per Grant, 2 Ves. & B. 371.

(x) 2 Vern. 526.

in the power of either of the sons (who were the immediate objects of the devise) to dock the intail of either of their moieties (the devise being made to them of moieties) during their or either of their lives.

Accordingly in *Blackburn v. Stables*, Sir William Grant, M. R. (y) said, "I know of no difference between an executory trust in marriage articles and a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter." But in that case he ruled, "that if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground (*viz.* provision for issue of a marriage) for decreeing a strict settlement;" and he added, "if it is clearly to be ascertained, from any thing in the will, that the testator did not mean to use the expressions which he has employed, in their strict, proper, technical, sense, the Court, in decreeing such settlement as he has directed, will depart from his words, in order to execute his intention: but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense, and have never said, that merely because the direction was for an intail, they would execute that by decreeing a strict settlement."

On the other hand, according to the cases of *Sweetapple* and *Bindon* (z), and *Legate v.*

(y) 2 Ves. & B. 369.

(z) 2 Vern. 536.

Stewell (a), and *Blackburn v. Stables (b)*, a distinction seems to have been taken between *executory trusts in wills, and in articles for a settlement*. In the former of these cases, money was given to a daughter, to be laid out in land, and *settled* upon her and her children; and, if she died without issue, then over: and in the latter case, *the devise* was for settling lands on “*A for life, and after his decease, to the heirs male of his body, and the heirs male of the body of every such heir male, severally and successively, as they should be in priority of birth, and seniority of age,*” remainder to *B*; and the rule proposed in the first of these examples was, *that in case of a voluntary devise, the Court must take the devise as they found it (c)*, and not lessen the estate or benefit of the legatee, although, on the like words in marriage articles, it might be otherwise, when it appeared that the estate was intended to be preserved for the issue; and in the latter case, it was observed, that where settlements were agreed to be made upon valuable consideration, the Court would aid *inartificial* words, and make an *artificial settlement*; and the Chancellor added, he never knew it done for a *bare volunteer*. However, in *Glenorchy v. Bosville (d)*, Lord Talbot said,

(a) 1 Eq. Abr. 395; 1 P. W. 187.

(b) 2 Ves. & Bea. 367.

(c) 2 Ves. & Bea. 269, accordingly, but *contra* by Lord Hardwicke, 2 Atk. 582.

(d) *Supra*; see also *Bagshaw v. Spencer*, 2 Atk. 582.

"The rule is not generally true, that in *articles* and *executory trusts* different constructions are to be admitted (e.) Still there seems to be the distinction, that, IN WILLS, though creating *executory trusts*, there must be *some expression* BESIDES THE MERE *limitation to the ANCESTOR* FOR HIS LIFE, to enable the Court to discover, that the testator meant that *the heirs should not take in that right*, and under the strict technical import of that term; while in *articles* for a settlement, which would leave the issue of the marriage, who are the objects of the settlement, wholly in the power of the settling parents, if the settlement were made in the language and *words of the articles*, the articles will be held irregular and informal, and the issue considered as objects of the provision, and as *purchasers* for a CONSIDERATION which extends to them: and the Court will decree a *strict settlement*, to secure to the children the benefit of the provision, supposed, by courts of equity, to have been intended for them.

From *Seale and Seale* (f) it is clear, that a direction that money shall be laid out in lands, and settled on one and his heirs males of his body, will not make the words descriptive of the heirs, to be a designation of *particular persons*; and *Blackburn v. Stables* (g), supports that decision.

In *Seale v. Seale* a testator directed, that all his money in the government funds, should be

(e) Cas. temp. Talb. 20.

(f) 1 P. W. 290; Prec. in Ch. 421. (g) 2 Ves. & Bea. 367.

laid out in a purchase of lands of 300*l.* or 400*l.* a year, and settled on his eldest son *A*, and the heirs male of his body, remainder to his second son *B*, and the heirs male of his body, &c. And though it was insisted that this, being the case of money directed to be laid out in land, was to be construed like *marriage articles*, when lands are covenanted to be settled upon the husband and the wife and the heirs male of the body of the husband, in which case the Court would order a strict settlement, *viz.* to the father for life, remainder to the first, &c. sons, to the intent the husband might not bar it; and for the same reason should do so here; the Lord Chancellor said this case differed; for that in marriage articles, the children are considered AS PURCHASERS: but in the case of a will, as this was, where the testator expresses his intent to give an estate-tail, a court of equity ought not to abridge the bounty directed by the testator (*h*).

In *Sweetapple v. Bindon* (*i*), a gift by will was of 300*l.* to be laid out by the executrix in lands, and settled to the use of the daughter *Mary*, and her children, and if she died without issue, then over; and it was decided, on the alleged ground that the Court must take the will as they found it, that *Mary* had an estate-tail in the lands to be purchased.

(*h*) See also *Bale v. Coleman*, 1 P. W. 145; 3 Ves. jun. 125; see 2 Atk. 58, *contra*; 2 Ves. & Bea. 367.

(*i*) 2 Vern. 536.

On the other hand, a devise was in these words, "to entail upon her and her issue all the estate and effects which should appear to belong to the testator, after payment of all his debts and legacies; but in case of her death, and failure of her issue, the trustees were directed to divide," &c. And it seems to have been decided, without much discussion, however, that the daughter was tenant for life, with remainders over in strict settlement. The reference to the authority is mislaid.

This case is opposed to *Blackburn v. Stables*.

And it will be obvious, that the case of *Legate and Sewell*, already cited, is, in principle, an authority for the same construction, under circumstances far more strong, in favour of a construction for a strict settlement; for in that case the ancestor was, by express limitation, to have an estate for life, and his heirs male were to take *after his decease*, and there were super-added words of limitation to the heirs male of every such *heir* male, and directions that the heirs male should take *severally* and *successively*, as they should be in *priority* of birth and *seniority of age*; and yet *these circumstances in a will*, giving a *legal* estate, as distinguished from equitable estates, *were not deemed sufficient to exclude the rule (k)*.

That the word *issue* may, *uno flatu*, be a word of purchase and limitation in a *will* CREATING TRUSTS which are executory, is settled by the

(k) 2 Ves. & Bea. 367.

case of *Glenorchy v. Bosville* (l). That case arose on a devise by a man to trustees, among other trusts, upon trust to convey the estate, after the marriage of his daughter with a protestant, to the use of his daughter for life, without impeachment of waste; remainder to her husband for her life, remainder "to the issue OF HER BODY," with several remainders over; and it was decreed by *Talbot*, Lord Chancellor, that the daughter should be only tenant for life with remainder to her first and other sons IN TAIL.

Even in a devise by will, the word issue may be construed to be a word of purchase and of limitation *uno flatu* (m).

And that the same word may have the like construction in articles for a settlement, is settled by *Hart v. Middlehurst* (n).

This case arose on articles for conveying lands, in trust for the husband for life, and afterwards to the issue of the match, in such manner, and subject to such charges for younger children, as the husband should, by deed or will, appoint; and Lord *Hardwicke* held, that a daughter, the only issue of the marriage, was entitled, under an equitable execution of those articles in strict settlement, to an estate-tail: issue of the marriage, he said, included male as well as female; and, therefore, if it had gone no further than to the issue of the marriage,

(l) *Ashton and Ashton*, cited 2 Atk. 582; 1 Ves. 149; *Villiers v. Villiers*, 2 Atk. 71. S.P.

(m) *Whitelock v. Hedding*, 1 Bos. & Pull. 244.

(n) 3 Atk. 371.

and a bill had been brought for carrying *the articles into execution*, the settlement must have been to ALL THE ISSUE; to the *first* and *every other son*, and for default of such issue, to the *daughters*, with proper remainders following one after the other; and that he had known several decrees of that kind on the words ISSUE of the MARRIAGE.

In *Jones v. Seys* and others (o), there were articles to convey, in an event which happened, to trustees, in trust, by one entire clause, for *Robert Jones and his issue* by any future wife, lawfully begotten, and for want of such issue, to the right heirs of the settlor; and the Court decreed an estate-tail to the first and other sons successively in tail, with remainder to the daughters in tail, with cross-remainders between them in tail.

In *Dod* and *Dod* (p), the articles were to lay out money in the purchase of lands, to be settled on the husband, *D. Dod*, for life, then on the wife for life, then on such issue of their bodies as husband and wife should appoint; in default of appointment, in trust, for the issue of their bodies, remainder to the right heirs of *D. Dod*: and on the bill of the eldest son, Sir *T. Clarke*, M. R. was of opinion, the lands ought to be limited in strict settlement, and settled on the first and other sons in tail, &c.

Also in *Meure* and *Meure* (q), money arising from the sale of lands was directed to be laid out in the purchase of other lands, and settled

(o) In Ch. 29 Nov. 1795. (p) Ambl. 274. (q) 2 Atk. 265.

in trust, to permit *A* to have the benefit for his life; 2dly, to permit *B* to receive the profits, &c. during his life; after his death, in trust for the issue of the body of *B*, lawfully begotten; in default of such issue, then over; and it was held, that the lands must be settled on the first and other sons in tail, with remainder to the daughters as tenants in common in tail, with cross-remainders between them. This case, however, had particular circumstances.

In some cases of articles, the issue are to be tenants in common, by the express stipulation of the parties.

In cases of this description, the Court would, it is apprehended, decree to them estates-tail, with cross-remainders between them in tail (*r*).

And in *Horne v. Barton* (*s*), the testator devised real estates to trustees and their heirs, upon trust, for the use and benefit of all and every his children who should live to attain the age of twenty-one years, or be married, which should first happen, in equal shares or proportions, *undivided*, for and during their respective lives, with remainder to their issue severally and respectively in tail general, with cross-remainders over; and he directed his trustees to make and execute a settlement of his said real estates accordingly.

There were only two daughters; and the Court, in decreeing a settlement, approved of cross-limitations of each moiety, so that the entirety

(*r*) *Dodson v. Hay*, 3 Bro. C. C. 404. (*s*) *Cooper*, 257.

was settled on each child, and the descendants of each child, in like manner as the original share was settled; only with the right to the possession at different periods, as in cross-remainders.

But in *Prebble* and others v. *Boghurst* and others, and *Prebble* v. *Prebble*, (2d June 1818,) a bond recited, that if at any time during the term of the natural life of *John Prebble*, he should be seised of any messuages, tenements, lands, &c. in possession, he would, by such good conveyances in the law as counsel should advise, settle the same upon the said *Mary Townsend*, and the issue of the said intended marriage, in such parts and proportions, and to such use and uses as should be thought requisite, to make a provision for her, in case she should survive said *John Prebble*.

And it was conditioned to be void if the said intended marriage took effect; and that the said *John Prebble* should, at ANY TIME during his natural life, become seised of any messuages, lands, &c. in possession, and should convey, settle, and assure the same upon the said *Mary Townsend*, and the issue of the said intended marriage, by such good conveyances in the law as counsel should advise, and to use and uses as should be thought requisite, the better to make a provision for said *Mary Townsend*, in case she should happen to survive said *John Prebble*.

The Court of Chancery decreed, that the condition of the bond ought to be specifically performed, and that, according to the true con-

struction of the condition, all the freehold and copyhold messuages, tenements, lands and hereditaments, which said *John Prebble*, the testator in the pleadings mentioned, became seised in possession at any time during his natural life, ought to be settled upon the issue of the said *John Prebble* and *Mary Townsend* his first wife.

And the Court also decreed, that *Mary Townsend*, the first wife of said testator, having died in his life-time, *John, Thomas, and Richard Prebble*, and *Letitia Jenner*, the children of the marriage with the said *Mary Townsend*, became entitled to have all the messuages, tenements, lands and hereditaments, of which said testator died seised in possession, conveyed to them as tenants in common in fee.

And in *Taggart v. Taggart (t)*, a bond, by way of marriage articles, bound a farm to be the right, title and interest as to one moiety of the issue whether son or daughter, if begotten on the body of the said *Rebecca* by the said *William*: and *Redesdale*, Lord Chancellor, decreed the children to be purchasers and tenants in common, with limitations over, in case any of such children died under twenty-one without issue.

One more case will be added, as relevant to this head, though the precise division to which it belongs is not easily ascertained.

In *Earl of Stafford v. Buckley (u)*, after directing his trustees to intail on his daughter and her issue, all the estate and effects which

(t) 1 Scho. & Lefroy, 84.

(u) 2 Ves. sen. 170

should belong to the testator, the will directed the capital to be laid out and secured, and the interest made good to testator's daughter for life, and to her lawful heirs for ever. But in case of her and their failure, the same should go to his nephews moiety. Lord *Hardwicke* observed, "As to the annuity, (being an annuity in fee,) I think it will fall under a different consideration from the rest of the personal estate. If estates of a different nature are comprised in this clause, *Forth v. Chapman* is an express authority for me that the words shall receive a different construction, according to the nature of these estates. Supposing, therefore, land was comprised in the direction of the trust, and the will so executed as to have affected lands, the Court could not possibly have directed any other settlement of the land, but to the daughter in tail. Undoubtedly so, if it had stood on the first words, to intail on her, &c. How is it explained by the subsequent clause, wherein the testator has declared his own intent, and made the construction himself? There it would have been a direction, the settlement should be on her for life; but saying her lawful heirs for ever, will be construed by the preceding word *issue*, which will make an estate-tail in her. So it would be as to land. The question then arises as to this particular instance of annuity, which is not real, but an inheritance of a personal thing descendible to the heir. The proper kind of limitation that is

capable of it, is distinct from mere personal goods and chattels. The testator having purchased it, was seised in fee of it at the time of making the will, and might direct it to be settled, as far as by law allowed to be so, not by way of strict intail, because not within the statute *de donis*, according to Lord Coke. No writ of entry could be brought of it, nor is it real estate; and the very statute itself shows it in the beginning of it, nothing being included therein but lands and tenements, and what partakes of their nature. And *Co. Litt.* 20, says, in all these cases, grantee has a fee conditional, as before the statute. The settlement then to be made of it, supposing the first question, that it is included in this power in the will, is in this manner, to the daughter for life, and the heirs of her body, which is in her a fee-simple conditional. The executors then clearly could not carry it over in remainder to the nephews, for no remainder could be created of any estate not within the statute *de donis*; for before it was a possibility of reverter, out of which a remainder could not be, upon this notion, that being but a possibility, it could not be grantable over; and if before the statute *de donis*, a man had granted lands to another and the heirs of his body, and said, in default of such issue, over to *B* and his heirs, that grant over had had been void (*v*); and on the having issue, the condition had been performed, and the grantee

(*v*) *Quære* this point; and see Ch. on Conditional Fees.

himself might have aliened, so as to have barred the possibility of reverter. So here, as this annuity is not within the statute *de donis*, if settled according to this will, to her for life, and the heirs of her body, if carried over, in default of such issue to the nephews, that would have been void: as soon as issue had, the condition is performed; she might have aliened, and barred the possibility of reverter to the donor. Here issue has been had, and consequently an absolute fee must be, if a settlement is made according to this will. This I take to be the legal construction of this devise, according to the different nature of these estates." And yet, strange as it may appear, Lord *Hardwicke* decided that the daughter had a mere *life* interest in the personalty; and as to the annuity, it would be difficult to support Lord *Hardwicke's* reasoning or conclusion.

NOTES.

Ex parte Sterne (*x*) shows the application of the rule to leases for lives, &c.

Suppose the owner of the equitable estate to have the equity of the freehold in one degree, and the equity of the limitation to his heirs in another degree, will the limitations unite?

The case may stand thus: *A* has the legal estate, *B* the equitable estate, and *B* limits the land to *C*, for the life of *D*, in trust for *D*, and

(*x*) 6 Ves. 156.

after the death of *D*, in trust for *D*'s right heirs, it is apprehended that the limitations would unite ; but this point is not clear.

Again, suppose a person to be tenant for his life, by the rules of the common law, with a limitation to the heirs of his body, by way of use, it is doubtful whether the interests would unite ; since, before the statute, they, as being of different qualities, would not have united.

A devise to *A* for life, and the heirs of her body, if any, is an intail in *A* (*y*).

Devise to *A* for life, and after her death to the heir male of her body, living at her death, is an estate-tail in *A* (*z*).

CHAP. IV.

On Estates in Fee.

A **FEE** is an estate which *may* continue for ever.

The word *fee* is explained to signify, that the land, or other subject of property, belongs to its owner, and is transmissible, in case of an *individual*, to those whom the law appoints to succeed him, under the appellation of *heirs* ; and, in case of corporate bodies, to those who are to take on themselves the corporate

(*y*) *Elton v. Eason*, 19 Ves. 73.

(*z*) *Richards v. Bergavenny*, 2 Vern. 324.

function, and, from the manner in which the body is to be continued, are denominated *successors* (*a*).

Estates in fee are of several sorts, and have different denominations, according to their several natures and respective qualities. They may, with propriety, be divided into

1. Fees-simple,
2. Fees-determinable,
3. Fees-qualified,
4. Fees-conditional,
5. Fees-tail.

The consideration of fees-conditional, and fees-tail, will be reserved for the next chapter.

A fee-simple is an interest which, in reference to the ownership of individuals, is not restrained to any heirs in particular, nor subject to any condition or collateral determination, except the laws of escheat and the canons of descent, by which it may be qualified, abridged, or defeated (*b*).

It gives the right of succession to all the heirs generally, without any other restriction than that they must be of the blood of the first purchaser, and of the whole blood of the person last seised (*c*); and it confers an unlimited power of alienation (*d*).

(*a*) Litt. § 1; 1 Inst. 1 b; Butler, 1 Inst. 271 b; Wright's Ten. 147. 150; Spelman of Feuds, C. 1; Fleta, lib. 5. c. 5. § 27; 2 Bl. Com. 104. 106; Hale's Analysis, 74; Bracton, lib. 4. 263 b.

(*b*) 1 Inst. 1 b; Plowd. 557; 2 Bl. Com. 104. 106; 10 Rep. 97 b; Wright, Ten. 148; Fleta, lib. 3. c. 8.

(*c*) 2 Bl. Com. Ch. Descent.

(*d*) 1 Inst. 223.

This position is warranted by the common law in its largest sense.

With a view to every possible case, it is too *general*; for, now, the power of alienation by ecclesiastical persons, or persons seised in right of their church, is restrained. However, the position still applies as generally as ever to individual persons, seised to their own use.

Though a fee-simple, in consequence of the restriction which has been noticed, being a restriction arising from the canons of descent, be descendible to some only of the heirs of the owner; as to the maternal heirs, in exclusion of the paternal heirs; yet, as the owner has a fee-simple, he may alien a fee simple; and his estate will, in the hands of the purchaser, be descendible to all the heirs of the purchaser, without any exception, qualification, or restriction; while an estate, which in the original gift is limited to a man and his heirs on the part of his father, does not confer the power of aliening the fee-simple.

Even the person who has a fee-simple descendible to heirs of the first purchaser only, may convey this fee to another, and take back the fee-simple to himself; and if he take back the fee-simple by a common-law grant, he will have his old estate, and be in, by continuance of the same seisin; and yet his estate will be descendible to all his heirs generally, with a preference to the paternal heirs over the

maternal heirs, though a maternal ancestor was the first purchaser under the former grant (e).

In this place it must be remembered, that the order of succession by heirs (ee), or the quality of the fee, is not changed by a conveyance from a man seised in fee by descent, *ex parte materna*, when he conveys to another in fee, either to the use of himself in fee, or he takes back the fee by resulting use. On this point, so useful and important in practice, a discussion will be found in a division to be set apart for the purpose.

Formerly it was the law, and indeed among the lower orders of society the opinion prevails at this day, that an estate which has descended from a father to a son, could not be aliened by the son to the prejudice of his children, or of his brothers, without their consent, or the consent of such one of them as was the next heir or first in the line of succession: and to professional men of extensive practice in the country, the idea of "*heir land*" has no doubt been frequently urged in this sense, even in application to estates in fee-simple, merely from the circumstance, that they have been once taken from an ancestor in the course of descent.

The qualities of estates-tail have more strongly impressed this notion on the minds of the people; a notion which was confirmed by the nature of

(e) 1 Inst. 31 b; *Price v. Langford*, 1 Salk. 337.

(ee) *Abbot v. Burton*, 2 Salk. 590.

this species of estate, between the interval when the statute *de Donis* was passed, and the mode of barring intails by common recovery, was invented ; or by fine with proclamations, was enacted.

From these qualities of a fee arises the rule, that there cannot be two fees-simple in the same land ; a rule to be examined in a subsequent page.

The rule, that one and the same person (*f*) cannot *have two fees* in the same land at the same time, may be ascribed partly to the nature of a fee at the common law, and partly, (as in those instances in which there are, through the medium of the statute *de Donis* (*g*), a base fee and a fee-simple in remainder or reversion expectant on that estate) (*h*), to the learning of merger.

Under this rule, determinable fees may become estates in fee-simple ; and the principle of the rule may be applied to cases like those of *Doe ex dem. Vincent v. White* (*i*), which will be noticed in a subsequent part of this volume.

The practice at the time when *Glanville* wrote, gave rise to the notion which has been stated. The same rule obtained in the feudal law ; but by the law (*j*) of this country, as now established, it is settled, that an estate in fee-simple is alienable by the owner, without the consent of any person whomsoever ; and a

(*f*) Plowd. 560.

(*g*) 13 Ed. I. c. 1.

(*h*) 3 Convey. 241.

(*i*) 15 East, 174.

(*j*) Bac. Abr. Mortgage (A. G.)

custom (*k*) or limitation (*l*) to restrain such alienation, generally, is void.

A fee-simple is the most ample of all estates (*m*). Indeed, all interests in real property are derived out of this estate; and by effluxion of time, surrender, or merger, ultimately resolve themselves into it.

For as it is very appositely observed by *Noy*, in his *Treatise on Tenures* (*n*), "This estate can never perish, so long as the *substance*, whereof the estate ariseth, hath a being. And, therefore, albeit that he which is seised of such estate, happen to die without heir, yet the *same* estate is not extinguished, but, by act in law, in some other degree, transferred to the lord of whom the lands were holden, by way of escheat; because the land, wherein the tenant hath such estate, doth still continue. But, if a man seised in fee of a rent-charge or rent-seck, dieth without heir, this fee-simple, although it be of the first sort, doth perish; because the rent, wherein he hath estate, being transitory, is, by such dying without heir, quite swallowed up and drowned in the land out of which it did issue." It has already been noticed, that, though the fee-simple cannot perish, the title to that estate may be discontinued as to one person, and resumed by another. This happens as often as a discontinuance or abatement is made, or disseisin

(*k*) *Salforde's case*, Dyer, 357 b; 3 Ves. jun. 325.

(*l*) Litt. § 361.

(*m*) Litt. § 11. 360. 1 Inst. 18.

(*n*) *Noy*, Ten. 65.

committed. In these instances the estate continues in point of time. The only change which takes place is in the *title*.

In *Plowden's Commentaries* (o), on the argument of *Walsingham's* case, there is a very precise and correct distinction drawn between the several fees.

The first is a fee-simple; and that is, where lands are given to a man and to his heirs absolutely, without *any* end or limitation put to the estate; for, as it is observed in the argument, fee is an inheritance, as *Littleton* says, and *simple* is that which is pure and perpetual; so that, inasmuch as he has an absolute estate of perpetuity in the land, such estate is properly termed a fee-simple.

Perhaps it may be right to observe, that every estate acquired by disseisin, except the disseisin of the tenant of a particular estate claiming only his estate, and also every estate acquired by abatement, intrusion, or discontinuance, is necessarily a *fee-simple*; and so is every estate which descends from a person who dies tenant in fee-simple, to his heir at law, although the estate may be descendible only to heirs of a particular class, as maternal heirs, and not to the heirs generally. Also, every estate derived under a common recovery suffered by tenant in tail, (admitting the person *who created the intail* was, at the time of making the gift in tail, seised in fee-simple), will be a fee-simple.

(o) Page 557.

On determinable fees and estates-tail, some further observations will be offered in the course of the present and the following chapter.

At present, it may be proper to observe, that a tenant in tail under a gift from a person who has a base, a qualified, or determinable fee, cannot, by means of a common recovery, acquire a larger estate than belonged to the donor of the intail (*p*). The estate derived under the gift in tail, and the recovery suffered by the donee or heir in tail, will be precisely that estate which was in the donor.

It must at the same time be remembered, that a common recovery suffered by a tenant for life, merely and simply as such, and operating as a tortious alienation, so as to divest the remainders and reversion, passes a fee-simple, whatever was the extent of interest in the grantor of the estate for life.

In this instance, the fee-simple is acquired by disseisin, and the fee-simple is, by a change of seisin, the cesser of the rightful seisin, and the commencement of a new title, under a tortious or wrongful seisin; a change expressed by the legal term *disseisin*.

Hence the doctrine of titles; hence the operations of titles, strengthened and confirmed by warranties, nonclaim on fines, and by the statutes of limitation. Cases of this sort also invite and admit of the learning of confirmations, releases of right, descents which take

(*p*) 1 Convey. p. 2.

away entry, remitter, and various other heads of law proper to titles.

Copyholders too are said to be seised in fee simple. This application of the word "seised," and also of the words fee-simple, must be understood according to the subject.

In point of quantity of estate, and extent of interest, a copyholder may have a fee-simple.

In point of tenure, and the quality of his interest agreeable to the law of tenures, the custom has given stability to his estate; and he holds at the *will* of the lord, as that will is expressed by the custom of the manor.

Again, some say a copyholder is seised, others, that he is possessed. Either expression is equally proper. In point of quantity of estate, a copyholder is said to be seised; in point of *quality* of estate, as to tenure, he is said to be *possessed*. Hence an observation by Mr. Justice *Blackstone*, that, "by the word freehold, is sometimes meant the interest, or estate itself, which the tenant holds in the land; sometimes the tenure by which that estate is holden (*q*)."

The excellency of this estate consists in its simplicity (*r*); hence its denomination; and it is very judiciously observed by some writer, that the purity of the estate imports a power of alienation (*s*).

And it is against the height and purity of a fee-

(*q*) Tracts on Copyholds, p. 137.

(*r*) 1 Inst. 1 b.

(*s*) Bac. Mortgage (G.); 1 Inst. 223.

simple, that all power of alienation by the tenant should be restrained (*t*). There are exceptions of offices of personal trust and foundership. Though of inheritance, they cannot be assigned (*u*); as an annuity annexed to a creation of dignity (*v*). So a partial restraint of alienation may be annexed to a fee; as a condition not to alien for a reasonable time, or to a particular person. But a fee subjected to any restraint of alienation, is not a *fee-simple*; it is a fee subject to a condition. And in *Goodill v. Brigham* (*w*), Mr. Justice *Rooke* very pertinently observed, that "When a man gives a fee-simple, he shall not be allowed to say, that such fee-simple shall not be subject to all the restraints which the law imposes upon it. The devisor having given a fee-simple, he could add nothing to it, and consequently the subsequent power is void." But even this observation must be confined to the particular case before the Court; and the case itself must be read and understood with the criticisms which have been offered on it (*x*).

The word simple, while it expresses that the estate is descendible to the heirs generally; in other words, simply, without restraint, to the heirs of the body, or the like; excludes both conditions and limitations, which might defeat or abridge the fee (*y*).

(*t*) Litt. § 361.

(*v*) Ib. 124.

(*x*) 3 Convey. 265. 494.

(*u*) W. Jones, 120.

(*w*) 1 Bos & Pull. p. 198

(*y*) 1 Inst. 1 b. 2.

The material difference between fees-simple and other fees is, that the former estate *will*, the latter estate *may*, continue *for ever*.

The word *fee-simple* is sometimes used by the best writers on the law, as contrasted with estates-tail (z). In this sense, the term comprehends all other fees as well as the estate, properly, and, in the strict propriety of technical language, peculiarly distinguished by this appellation.

Fleta is so full and so accurate in describing a fee-simple, that a passage from that correct writer will be added (a):—*Simplex donatio et pura est, ubi nulla adjecta est conditio, neque modus; simpliciter enim datur quod nullo additamento datur; ut ecce, do tibi tantam terram cum pertinentiis in tali villa pro homagio et servitio tuo, habendam et tenend' tibi et hæredibus tuis, de capitali domino feodi, et hæredibus suis per servitia inde debitâ et consueta, reddendo inde mihi et hæredibus meis, tu et hæredes tui per annum tantum, ad tales terminos pro omni servitio, consuetudine, et demand' seculari: Ita quod certa sit res quæ datur, et certa servitia in scriptis sint expressa donatori, saltem facienda, quamvis incerta fuerint alia quæ tacitè remittuntur, et ego et hæredes mei warrantizabimus, acquietabimus et defendemus prædictam terram tibi et hæredibus tuis contra omnes gentes per prædicta servitia; et sic acquiris rei dominium ex causâ donationis et hæres tuus post te ex causâ successionis; hæres enim tuus licet in donatione comprehendatur, non*

(z) 1 Inst. 19 a.

(a) Lib. 3, c. 8, p. 185.

tamen aliquid sibi acquirit in donatione, eo quod tibi soli facta est donatio, tibi tenendum et hæredibus tuis; sub cujus VOCABULO omnes hæredes propinqui comprehenduntur, et remoti, nati et nascituri.

This passage is deserving of attention, as showing, that at this early period the heirs were not objects of the gift, and did not gain any certain or indefeasible title from the gift. They were named for the purpose only of extending the gift, and marking the measure of the grant by a limitation to the heirs, as the successors to the donee in his right, and by descent from him. The idea of *heir* land must have ceased at the period when *Fleta* compiled his work.

Qualified and determinable fees have, by many authors (*b*), been confounded, in terms, with fees-simple. The context will, in general, direct the student to the sense in which he is to understand these expressions. In propriety of language, the word *fee* expresses the *genus* of estates of inheritance; and the epithets added to this term, describe the several species of this estate.

That an estate is improperly termed a fee-simple, when it is either base, conditional, or qualified, is the express doctrine of Lord *Coke*, as well as the result of grammatical precision; and yet, of the numerous writers on legal subjects, scarce any one has confounded this term, in the use of it, more than Lord *Coke*;

(*b*) 1 *Inst.* 1 b. 27 a.; *Flow. Com.* 560.

and this is more singular, since no one was better acquainted with its application, or had a more correct knowledge of its precise meaning. This will be evident from those passages to which reference is already made.

Besides, Lord Coke (*bb*) has in so many words taken notice, that of fee-simple, it is commonly holden that there be three kinds; *viz.* fee-simple absolute, fee-simple conditional, and fee-simple qualified, or a base fee; and has observed, that the more genuine and apt division, were to divide fee, that is, inheritance, into three parts; *viz.* simple, absolute, conditional and qualified, or base; for this word, simple, properly excludeth both conditions and limitations that defeat or abridge the fee. By this passage, he clearly shows there is a distinction between fees simple, and qualified or determinable fees.

A *determinable fee* is also an interest which *may continue for ever* (*c*). It is a quality of this estate, while it falls under this denomination, that it is liable to be determined by some act or event, expressed on its limitation, to circumscribe its continuance, or inferred by the law as bounding its extent (*d*).

Limitations to a man and his heirs.

1. Peers of the realm (*e*);
2. Kings of Scotland (*f*);

(*bb*) 1 Inst. 1 b.

(*c*) Plow. 557; Shep. Touch. 97.

(*d*) 2 Bl. Com. 109.

(*e*) 2 Bl. Com. 109; 1 Inst. 27.

(*f*) 1 Cruise's Digest, 24.

3. Lords of the manor of *D* (*g*);
4. Tenants of the manor of *Dale* (*h*);
5. During the time while a particular tree, a tree in any wood, or any tree in a certain wood, &c. shall stand (*i*);
6. Whilst a man (or woman not being the donee) shall have heirs of his body, or issue of his body (*j*);
7. Till the marriage of a person shall take place (*k*);
8. Till a person at *Rome* shall return from *Rome* (*l*); or till a person shall go to *Rome* (*m*).
9. Till debts shall be paid (*n*);
10. Till default shall be made in payment of his debts (*o*);
11. As long as *A* [add, and his heirs] shall pay 20 *l.* annually to *B* (*p*);
12. So long as *St. Paul's* shall stand (*q*);
13. Until a sum, (that is, a sum incertain) shall be paid by a particular person (*r*);

(*g*) 1 Inst. 27 a.

(*h*) 2 Bl. Com. 109; 1 Inst. 27; and Lord Hale's Notes, 4 Com. Dig. 5.

(*i*) Kitch. 301; 27 H. VI. 29; 11 Rep. 49; 1 Lord Raym. 326.

(*j*) Plowd. 557; 1 Inst. 18; 10 Rep. 97 b; Shep. Touch. 46. 103. 402; 3 Leon. 117.

(*k*) Cro. Jac. 593; 10 Vin. Abr. 233:

(*l*) Fearne, 8.

(*m*) Shep. Touch. 122.

(*n*) Fearne, 187.

(*o*) Leon. 33. 2 Woodd. 733.

(*p*) Plow. Com. 557; 11 Rep. 49 a.

(*q*) Plow. Com. 249. 557.

(*r*) *Cocket v. Sheldon*, Moor, 15.

14. Until an act shall be done (*s*);
15. Until a minor shall attain his age of twenty-one years (*t*);
16. Until legacies shall be paid (*u*);
17. Until they shall have made a lease (*x*);
18. Until he otherwise should dispose of the same (*y*);

are instances of this species of estate; and these are examples of fees determinable by express limitation. Some of these examples have the same construction in deeds and wills, and in some instances of wills, though there be not any limitation to the heirs.

Let it be remembered, that a gift by will to *A* and his heirs, if he have issue of his body, is an estate-tail in him (*z*). And there may be a fee by deed or will, determinable under the learning of executory devises or springing uses, although the original gift be to a person generally and his heirs for ever. There is scarcely any event (being a lawful event), and to happen within the rule prescribed against perpetuities, which may not be made the cause of the determination of this fee; as death, with-

(*s*) Dyer, 300 b; and see *Blagrove and others v. Chan*, for observations on the equity; 2 Vern. 523. 578; *Thomassin v. Mackworth*, Carter 75, 107; and *Burworth's* case there cited.

(*t*) *Tracey v. Lethulier*, 3 Atk. 74; Ambl. 204; *Fearne*, 342; 9 Mod. 28; *Spenser v. Chase*, 10 Vin. Abr. 203.

(*u*) 3 Atk. 560. 562.

(*x*) *Lusher v. Panbery*, Dyer, 290 a.

(*y*) Carter, 96, *Earl of Bath's* case.

(*z*) Shep. Touch. 103.

out having had, or without leaving, issue, or without having aliened, &c. &c. (*a*): and these are some only of an infinite number of examples to be found in the books.

In wills, limitations for indefinite periods, give chattel interests, when the limitation is not to the *heirs*, and when there are not any circumstances which afford an inference that the inheritance is to pass to the trustees (*b*).

Even in wills, a devise to a man and his *heirs*, till debts *are paid*, passes the fee, and not a chattel interest (*c*), except under special circumstances.

Chattel interests pass only when the devise is without any limitation to the *heirs*, so that the trustees have an *incertain interest*; or, in other words, an interest without any *definite time*; and the quantity of interest, or period of enjoyment, is expressed by the clause, *till debts are paid*; or when the context requires that the fee should be in the beneficial devisees. In those instances in which the interest is *certain*, the limitation being to the trustees and *their heirs*, the Court cannot, except

(*a*) *Beachcroft v. Brown*, 4 Term Rep. 441.

(*b*) See 1 Burr. 234; 5 East, 170.

(*c*) *Wright and Pearson*, Ambl. 358; *Fearne*, 187; *Bagshaw and Spenser*, 2 Atk. 246; *Jones v. Say and Sele*, 8 Vin. Abr. 262; 2 Bro. P. Cas. 1; *Goodtitle v. Whitby*, 1 Burr. 228; *Trodd v. Downes*, 2 Atk. 204; see also Cowp. 833, in *Doe v. Fyldes*; *Strong and Teat*, 2 Burr. 910; *Wellington and Wellington*, 4 Burr. 2165; 1 Black. Rep. 645; *Gibson v. Rogers*, Ambl. 97; *Lethulicr v. Tracey*, 3 Atk. 74.

from a context, declare such interest to be a *chattel*, or any other estate than a *fee*; which, by the words of devise, it purports to be. As Lord Keeper *Henley* very justly observed (*d*), “to adopt a different rule of construction, is to change *the trustees* contrary to the intention of the testator; as the personal representatives might become trustees, instead of the *heirs* at law.”

All or some of the cases cited in the margin will be introduced, and more minutely examined, in the chapter on *Estates for Years, and Interests of a Chattel quality*; and some of the cases, treating the trustees as having chattel interests, under circumstances and expressions which import a gift in fee (*e*), are in particular deserving of notice.

An estate with a determinable quality, by construction of law, properly falls under the denomination of a determinable fee, although no qualification be expressed, to ascertain the time of continuance.

Suppose the owner of a determinable fee to convey that estate to a man and his heirs generally, and without any restriction; the construction of law on this conveyance would be, that the determinable quality annexed to the estate, while in the tenancy of the person by whom it is conveyed, shall follow the same into the hands of the person to whom the transfer is made.

(*d*) *Doe v. Simpson*, 5 East, 162.

(*e*) *Goodtitle v. Whitby*, 1 Burr. 228.

The appropriate maxim is, "*nemo potest plus juris in alium transferre quam ipse habet.*"

Again, suppose a person seised of an estate in fee-tail, general or special; to make a conveyance of that estate by any instrument which passes merely the time or degree of his interest, and does not operate by *discontinuance*; the assurance will pass an estate in fee, determinable on the death of the tenant in tail; and the failure of the issue inheritable under the terms of the gift; or, more correctly speaking, as long as the ownership under the estate-tail shall continue (*f*); but subject to be defeated by the entry of the issue in tail, unless their title of entry shall be barred by fine with proclamations, &c. or the statute of limitations (*g*).

The fine, it is to be observed, would, if with proclamations, bar the intail, and defeat the title of the issue, claiming under the gift by which the intail is created, and render the estate indefeasible by the issue during the continuance of the estate-tail (*h*).

A conveyance by bargain and sale (*i*) gives an

(*f*) Shep. note on Shep. T. 317.

(*g*) *Doe and Whitehead*, 2 Burr. 704.

(*h*) Plow. Com. 557; 1 Tr. Atk. 8; 2 Lord Raym. 778. *Machell and Clarke* is an express adjudication on the point; and the report contains a full examination of all the cases on the subject. 1 Cruise, 176; see also 3 Burr. 1705; *Goodright v. Meade*, Cro. Car. 499; but see 2 Atk. 133, *Sir John Barnardiston v. Lingwood*.

(*i*) 10 Rep. 25. *Seymour's case*.

equal extent of *interest*; but on the death of the tenant in tail, his issue, claiming *per formam doni*, may defeat the estate taken under a conveyance by this or any like mode of assurance; unless, by means of a fine levied with proclamations, or common recovery suffered by their ancestor, the issue are precluded from all right to assert a title under the intail.

The subject of these observations might be insisted on more fully, and in more precise terms. These notes will furnish an outline of the learning; and the reader is referred to the reported cases. In the next chapter a summary view will be taken of the effect of different conveyances by tenant in tail.

So where tenant in fee-tail general, that is, any one who has an estate to him and the heirs of his body, does by a fine, not creating a discontinuance, convey the land to some other person, this person will have an estate in fee to him and his heirs generally, till there shall be a failure of the heirs of the body of the tenant in tail; and it is observable, that if he be tenant in tail by descent, under a gift to any of his ancestors, then the grantee will have an estate till there shall be failure of heirs of the body of the original donee; in other words, till the proper determination of the estate tail. For instance, when a gift is made to a man and his heirs of his body, who dies, leaving daughters, and each of them dies leaving a son, a fine levied by

either of these sons, will give a fee of the same extent as the estate-tail (*k*).

The opinion to be formed from these deductions is, that the fee will not determine by the failure of the issue of the person who makes the conveyance. On the contrary, it will continue, as long as the person to whom the estate-tail was originally given shall have issue inheritable under the terms of that gift. And in case the intail be subject to any other qualifications, as limited to particular heirs, as males or females, or the heirs of the body of the donee by any particular person, as *A B*, the estate in fee, derived in point of title from the conversion of the intail into a base fee, will be so far subject to this qualification, that it will continue only till a failure of heirs of that description.

In these cases, though the words of limitation are general (*l*), the estate which they pass will be determinable. Words alone cannot give the extent of *interest*. There must reside in the person who is the author of these words, and whose meaning they express, an interest to give effect to the words ; and this interest must be an estate conferring a power of *alienation*.

Although an estate-tail be converted into a base or determinable fee, yet the right of suffering a common recovery remains to the donee in tail, or the heir under the tail, with the assist-

(*k*) *Mackwilliam's case*, Hob. 33.

(*l*) 1 Inst. 1 b ; Plowd. 557.

ance and co-operation of the person who has the freehold (*m*). But the assignee of a tenant in tail cannot, by suffering a common recovery, change the quality, or enlarge the duration, of his estate (*n*).

And the assignee of a tenant in tail, cannot make any tortious alienation, by which he can change the seisin, or divest the estates of those in reversion or in remainder, as may be done by the assignee of a tenant for life: for the assignee of a donee for life is tenant for life; but the assignee of a donee in tail, is not tenant in tail (*na*).

An estate-tail changed into a fee by a rightful conveyance, has been termed a base fee; however, it may with great propriety be distinguished by the appellation of a determinable fee. Every estate, not simple and absolute in regard to continuance of time, is base, in reference to one which has these qualities. It is in this sense, and with a view to this distinction, that the epithet *base* is applied to estates.

A determinable fee (unless otherwise restricted, so that it properly assumes the name of a qualified fee, in respect of the limited and confined manner in which it is to descend, at the same time that it is a determinable fee in point of duration,) may, during its continuance, devolve on any one who is in the line of succession to the first purchaser; and the estate, into whosoever

(*m*) 1 Convey, 22.

(*n*) Ibid. 4. 123. 140.

(*na*) Ibid. 4.

hands it shall come, will determine on the event, which, on the first limitation thereof, is expressed to mark the time of continuance.

A fee determinable in its creation, may, eventually, (and without any act of the party by taking a further assurance) become simple and absolute (*o*). Suppose a limitation to be made to a man and *his heirs*, 1st, *till the marriage of B*; or, 2dly, *till the return of C from Rome*; and the death of *B* to happen before his marriage, or the death of *C* to take place before his return from *Rome*; by these circumstances, it becomes impossible that the event, expressed for the determination of the estate, should ever arise; and the estate will, for that reason, continue to all eternity, precisely in the same manner as if the parties had not annexed to the disposition, any collateral limitation, giving to the estate a determinable quality.

This observation has application to those instances only in which the duration of the estate is referred to an event which is such in its nature, that it may become impossible, and, consequently, never happen: and not to those cases which refer to an event which must happen, either sooner or later; as *till a tree shall fall*, or *while a tree shall stand*.

On these instances, and indeed on all limitations which can be ranked under this class (*p*), it is observable, that the reversion or remainder expectant on these estates, or the possibility of

(*o*) Dyer, 300, pl. 29.

(*p*) 1 Inst. 28.

reversion, which is left in the person who limits them, must remain in some person; and that a release, or other proper assurance from that person, will give to this estate, the quality of a simple and absolute fee.

In the example of the limitation to *A* and his heirs (*q*), tenants of the manor of *Dale*; the estate will continue as long as *A* and his heirs personally, and individually, shall be the tenants, that is, owners, and not *occupiers* only, of that manor, and no longer. As soon as their tenancy shall end, the estate taken under the limitation will cease, and the estate can never become absolute under the terms of the limitation.

The like rule applies to several of the other instances which are adduced. In some of these instances, as till the marriage of *B* shall be solemnized, or the return of *C* take place, though the estate will determine, when the event marked as the boundary to the time of continuance shall happen, yet if it become impossible, by death before marriage in the first case, or in the second case, by death before return from *Rome*, or by any other means, in like cases, that the event should ever happen, then the estate will, for the reasons already assigned, become simple and absolute. In the mean time, the whole estate is in the grantee or owner (*r*), subject only to a possibility of reverter in the grantor.

The grantee has an estate which may con-

(*q*) * Bl. Com. 107.

(*r*) Plow. 567.

tinue for ever; though there is a contingency, which, when it happens, will determine the estate.

This contingency cannot with propriety be called a *condition*; it is part of the limitation; and the estate may be termed a fee. *Plowden* uses the phrase, *fee-simple determinable*.

In the instance of a gift to a man and his heirs till marriage, or till return from *Rome*, the fee passes by force of the word *heirs*; and by reason that the estate is not measured by the life of a person, but by reference to an event, which may or may not happen.

Omit the word *heirs*, and there would be merely an estate of freehold; determinable, in one instance, by death without marriage, and, in the other instance, by death without returning from *Rome*.

So, on the other hand, an estate to *A* and his heirs during the widowhood of *A*, or during the time *A* shall remain in *Rome*, is merely an estate of freehold measured by a life; for the widowhood of *A*, or the residence of *A* in *Rome*, will determine with his *death*. Provided an estate cannot continue beyond the life of *A*, it is an estate for his life; and for his life not merely and simply; but determinable, according to the terms of the limitation, either by marriage, or by return from *Rome*.

Again, let it be kept in mind, that although a person who has an estate for life, or several lives, make a grant, as distinguished from a

tortious alienation, to another and his *heirs*, the grantee will, in point of law, have an estate only for the life or several lives. The maxim applicable to this case is, "*nemo potest plus juris in alium transferre quam ipse habet.*"

Some passages to be found in the books import, that there cannot, in point of law, be an estate to a man and his heirs, peers of the realm ; or to the queen and her heirs, queens of *England*. The authorities are to be read, with a qualification or explanation. A limitation in either of these or the like forms will be good ; but the estate in fee, as distinguished from an estate-tail, cannot go in a line of succession, so as to continue the estate to peers, &c., when other persons are heirs. The law, in order to preserve the rules prescribed for the succession to estates in fee, will determine the estate, as soon as there shall be an interruption in the descent, to heirs of the required description.

Thus (*s*), in the instance of a grant by King *Henry III.* of the manor of *Penrith* and *Sourby*, to *Alexander*, king of *Scotland*, and to his heirs kings of *Scotland*; *Alexander* having died, leaving daughters, and not having any heir king of *Scotland*, King *Edward I.* recovered seisin ; and the daughters, though his general heirs, were excluded, because they were not kings of *Scotland* (*t*).

In this place also it may be observed, that when an estate does, under these circumstances,

(*s*) *Hale*, note 6, to 1 *Inst.* 27 a.

(*t*) 1 *Cruise's Dig.* 24.

determine by the failure, for a time, of the heirs, the estate will not revive, by the existence of such heirs at a future period: thus, though the daughters had died, and a nephew, who was king of *Scotland*, had become the heir, yet the estate would not have revived.

So in *Poole v. Nedham*, or *Paradine's case* (u); *Thomas Paradine*, seised in fee, by way of remainder expectant on an estate-tail male in *John Paradine*, granted to the Queen and her heirs, during the life of *John Paradine*, and after his death, so long as any issue male of *John* should be alive. Among other things, it was decided, that by the death of *John* without issue male, the estate of the Queen was determined, so that she should not have any benefit from the grant, being a dry remainder, without profit, while it would have been different, if *Thomas* had had the reversion; and *Yelverton* said, and the Court agreed, that if the estate determined by the failure of issue male for a time, although issue male was afterwards born, the estate should determine, and not revive by the birth of issue male, no more than where land is given to *I S* in fee, so long as *I D* has issue; for there, if *I D* die without issue, his wife being *ensient*, the issue born afterwards shall not revive the estate, for it is a collateral determination, which, being once interrupted, shall not ever be set on foot again.

But if a child *en ventre sa mere* be the heir,

(*) *Yelv.* 149; 1 *Inst.* 182, and the note *supra*.

then it might at this day be questioned whether the existence of such heir would give continuance to the estate.

The first impression would be in favour of the heir *en ventre sa mere* (w.) The decisions would probably support his claim. Such a child may be vouched as heir; and yet, as between a child *en ventre sa mere*, and a person actually *in esse*, there will be a descent, for the interval between the death of the ancestor and the birth of the child, to the person who is *in esse*; and such heir *pro tempore* will be entitled to the intermediate rents and profits (x).

To this head of determinable fees (y), the learning of estates in fee, subject to executory devises, may be referred; as all fees, liable to be defeated by an executory devise, are determinable fees, till they are discharged, by event or by release, from the determinable quality.

Various examples of fees determinable by express limitation have been stated. It must be remembered, that the succession by heirship to these determinable fees, is in the same order, and under the same rules, as the succession to estates in fee-simple; giving preference to those heirs, who are first in the line of succession, according to the established rules of descent (z).

(w) *Doe v. Clark*, 2 H. Black. 399.

(x) *Bassett v. Bassett*, 3 Atk. 203; Watk. Desc. [217.]

(y) *Goodright v. Searle*, 2 Wils. 29.

(z) *Vide* Bacon's Abr. Title "Heir."

It is not in the power of any person, by his own act, to entitle another to take as his heir, by descent, unless the law has imposed that character on him; and for this reason, a limitation of land to a man and his heirs, *peers* of the realm, though it will exclude all his heirs who are not invested with this dignity, will not entitle peers, or give continuance to the estate, unless they also are the general heirs.

For in the instant that the character of *heir*, and the dignity of the peerage shall be separated and fulfilled in distinct persons, the estate will cease, and absolutely determine, because the person, who is first in the line of succession, is not a peer of the realm; and because the person, who is more remotely related, and further back in the line of succession, and is a peer of the realm, is not the person whom the laws have designated to be the heir.

This consequence of law flows from the rules, first, that estates in lands, or other corporeal hereditaments, or incorporeal hereditaments already created, are not, as has been shown in the second chapter, allowed to be desultory; so that they may be suspended at intervals or different periods; and, secondly, that the line of succession cannot be varied by the party.

It is to property of this sort alone, that the observations respecting desultory estates apply, immediately, and in their fullest extent. Incorporeal hereditaments, on a grant of the same originally, and in the first instance, are not, as

already shown, within the same reason, and therefore not influenced by the same principle.

Under a similar limitation of incorporeal hereditaments, on the first creation of the estate, the estate would not cease or determine, merely because the person first in the line of succession is not a *peer*. It would be suspended only, till the character of heir, and the dignity of peerage, unite in the same person.

This seems to be the result of the cases introduced by Chief Baron *Comyns* into his Digest (*a*); in which he says, in the patronage of an hospital, or other thing created *de novo*, in which there was no *precedent* estate, a man may have the fee to him and his heirs, qualified in a particular manner; as if a queen consort institutes an hospital, and reserves the patronage, *sibi et Reginis Angliæ succedentibus* (*b*).

But in estates already *in esse*, such desultory inheritances, as the Dutchy of Cornwall, limited to the Prince *et ipsius et hæredum, &c. Angliæ primogenitis*, shall not be good, except when limited by act of parliament (*c*). So a limitation of an *advowson* to the queen, and the queens her successors, shall not be good, without an act of parliament (*d*).

The reason for this difference, may be collected from the chapter treating of the doctrine of the freehold.

It proceeds on the grounds that the freehold

(*a*) Com. Dig. Estates, A. 1.

(*b*) Cas. Ch. 214.

(*c*) 8 Rep. 16; Com. Dig. Roy, G.

(*d*) Cas. Ch. 214.

might be in abeyance, and that there would not be any person, against whom a demand of the freehold might be made.

These observations belong to those subjects only of property, which are regulated by the general laws; and not to those which, from their local situation, are governed by provincial usages, as Gavelkind, Borough-English, and Customary lands; for as to property of this kind, it would be as fruitless in any owner, to attempt to reduce the succession to the standard of the general rules of the common law, as it is to attempt to vary the order of succession to property, not exempt from these rules. The rule is, *lex loci est observanda* (e). And the common law is the law of every place in which no particular usages have been allowed and sanctioned.

In respect of customary lands, attempts have been made to vary the order of succession by means of trusts. No doubt, the common law heir may, by a trust, as he might by a legal limitation, properly framed, be substituted for the customary heir, by making the common law heir a purchaser. This can only be in the gift, and to the extent within which, by the rule against perpetuities, the designation of a purchaser would be effectual.

Let a descent attach, and the customary heir must be preferred. The order of descent cannot be changed in reference to the trust, any more than it can be in reference to the legal estate (f.)

(e) 1 Inst. 27.

(f) *Pullen v. Lord Middleton*, 9 Mod. 483.

The like observation is applicable to attempts, to intail the trust of copyhold or customary lands, when the legal estate cannot be intailed.

A qualified fee is an interest, given on its first limitation, to a man and to certain of his heirs, and not extended to all of them generally, nor confined to the issue of his body (*g*).

A limitation to a man and his heirs *on the part of his father*, affords an example of this species of estate (*h*).

It may be questioned, whether a limitation to a man and his heirs, within a certain degree in the direct descending line, without any express appointment, that these heirs should be of his body, though necessarily they must be his issue, will be deemed an estate of this quality (*i*).

The only doubt arising on a limitation in this form is, whether it does not create an intail.

No decision has occurred, on a limitation in these terms.

That the limitation would be good, is indisputably clear.

The single question to be raised on the limitation is, the construction it shall receive; and the object of that question would be, to ascertain the quality, extent, and degree of the interest which is conveyed.

A limitation in these words, is confined so strictly, that it may be argued, with some

(*g*) Fleta, lib. 3, c. 3.

(*h*) Litt. § 354; 1 Inst. 27 a, 270.

(*i*) 2 Bl. Com. 322.

semblance of reason, that it gives an estate-tail. These arguments, however, do not apply to a limitation to a man and his heirs on the part of his father; for the grant is not restrained to the *lineal* descendants of the person, to whom the limitation is made.

It extends to his heirs in the ascending line; and though, as a necessary consequence of the rules of law, it is confined to the heirs of the body of some person, no intail is created, because the limitation is not restrained to the issue of that person, by whose heirs the degree of interest, imported by the limitation to the heirs, is described; nor is the gift to the heirs as purchasers, as in the instance of a gift to *A*, and the heirs of the body of *B* (*k*). The law might as well determine a limitation to a man and his heirs generally, as a limitation to a man and his heirs *on the part of his father*, to be an estate-tail. Indeed, Lord Coke (*l*) has stated the law to be, that a limitation to a man and *his* heirs of the body of his father, gives an estate in fee, and not an estate-tail.

The same author has also asserted (*m*), that a gift to a man and *the* heirs of the body of his father, does, as to the words which name the heirs, pass an estate-tail; while, as already noticed, a limitation to a man and *his* heirs of *the* body of his father (*n*), does not create an intail within the

(*l*) *Mandeville's case*, 1 Inst. 26 b; *supra*, ch. 3.

(*k*) 1 Inst. 27.

(*m*) *Ibid.*

(*n*) *Ibid.*

statute *de Donis*. The heirs who are to succeed to the estate are, by the express terms of the limitation, to be the heirs of the son; and it is not provided that they should be the issue of his body; for this reason, no estate-tail is created. The heirs which are described, may be the issue of an ancestor in a higher degree, and still be within the terms of the limitation.

All the descendants of the father, as well as the descendants of the son, are, by the words of limitation, to be inheritable to the estate; and it seems to be a quality of an estate-tail, to entitle none besides the issue or lineal descendants of the first donee, or those who stand in the same degree of relationship with him, and are part of a class (*o*); and these issue only, when they can severally claim in successive order, under a general name of purchase, as heirs of the body of their father; and that denomination is equally applicable to all of them. For the mode in which heirs will become entitled, when they are to take under a collective name of description, the reader is referred to the observations on the rule in *Shelley's case* (*p*).

A gift to a man and *the* heirs of the body of his father (*q*), though made by the same sentence, and the same clause, contains, in construction of law, several and distinct gifts;

(*o*) *Mandeville's case*, 1 Inst. 26 b; *Hodgkinson and Wood*, Cro. Car. 17; *Southcote and Stowell*, 2 Mod. 207; *Wright and Pearson*, Ambli. 358.

(*p*) *Supra*, ch. 3.

(*q*) 1 Inst. 26 b, 27 a.

one to the son, the other to the heirs of the body of his father; and these heirs will take by purchase, as persons described by that name.

The son to whom the gift is made, may have a title under each of the gifts, and thus become tenant in tail.

His title under the limitation to the heirs of the body of his father, will depend wholly on the fact, that he unites in himself that description.

Unless he be the heir of his father, he cannot claim under the second branch of the gift, till this character shall be fulfilled in his person; and, in the mean time, the gift to the heirs of the body, will confer a title on that person, who is the heir of the body of the father, if he be dead, and in case he should be living, the gift will wait for effect till his death; and, in the interval, the estate-tail will be in abeyance, or contingency, for want of a person in whom it may vest.

That a limitation, frequently occurring in wills and in settlements (*r*), does or does not afford another instance of a qualified fee, seems involved in some doubt. The limitation now under consideration is, to the right heirs of a man, when the heirs are to take as purchasers, *eo nomine*, and of course, the estate does not vest in their ancestor. This limitation cannot have effect in any case, to give an estate to the heirs by purchase, unless it be made to the heirs of a person, who takes no preceding

(*r*) 1 Inst. 210 b; *Gordon v. Goodynn*, 1 Ves. 227.

estate of freehold, by the same dead or instrument; nor unless the person, to whose heirs the limitation is made, be a stranger in point of estate. Mr. *Fearne* inclined to the opinion, that it gives a *fee-simple* to the person in whom the estate first vests; and such is the opinion generally entertained by the most experienced lawyers in the conveyancing department. Mr. *Fearne* (s) observes, "in a limitation to the right heirs of *IS*, without any antecedent limitation to *IS* himself, it appears, that to give the estate to his heirs by purchase, would not secure and confine the succession to the whole class of descriptive heirs of *IS*; but in case of such a limitation to the heirs of the body of *IS*, we have seen it might."

When a man is the owner of the estate (t), and makes a limitation by a conveyance at common law, to his right heirs, by that name; or devises to his right heirs by that name; or devises to the individual who solely unites in himself this description, by his proper name, (so as in a will the heir be to take in the same degree (u), and in the same manner, and an estate of the same quality, as he would be entitled to take by descent); in one case, the conveyance, and in the other cases,

(s) Butler's *Fearne*, 192.

(t) 1 Inst. 22 b; 4 Burr. 879; *Hurst v. Earl of Winchester*, Vin. Abr. *verbo* Heir, 1. 2; *Dyer*, 156 a b; *Gadolphin v. Athington*, 2 Atk. 57.

(u) *Hedger v. Row*, 3 Lev. 127; *Harris v. Bishop of Lincoln*, 2 P. Wms. 135. To the right heirs of his mother's side, when he took from his mother's mother; *Wack. Desc.* 268.

the devise, is void as to the heirs. But, under a devise to several persons, being co-heirs, either as joint tenants or tenants in common in fee, they will take by purchase.

So a devise to one of two persons, being co-heirs, or to two of three or more persons, being co-heirs, would make the devisee or devisees, a purchaser or purchasers.

Since, if there were a descent, the other co-heir or co-heirs would necessarily participate.

If the devise be to the person, who is heir, for an estate-tail, or for life, or for years, he will take by force of that gift, and by purchase.

Till a recent period, *Scott v. Scott* (x) warranted the conclusion, that even a devise in fee, subject to a limitation over by executory devise, altered the quality of the estate, and rendered the heir, being a devisee of the fee, a purchaser.

That case (and for the purposes of title, it may be said, unfortunately) is overruled, by *Doe ex dem. Pratt and others v. Timins* and another (y). The latter case will, in all probability, give occasion to further litigation, on the part of those, who have accepted titles under the authority of *Scott v. Scott*; a case which was supposed to have settled the law, and, with great deference, it be said, was founded on a basis and on principles, which gave it a claim to be followed.

That *Scott v. Scott* was contrary to former determinations, and professed to overrule them,

(x) *Ambler*, 383; 1 *Eden's Ch. Ca.* 458.

(y) 1 *Barn. & Ald.* 530.

was a reason (z) for following *Scott v. Scott*, instead of opening a new field of litigation, and rendering the law on this point open to doubt and dispute.

A general rule belonging to this subject is, that no man can, by a gift, by deed or will, make his right heir a purchaser *by that name* (a).

Another rule is, that when a devise is made to a person who is heir, of the same estate as he would take as heir, he shall take by descent as his better title (b).

At the common law, no one could grant even to the heirs of his body, by that name, to make them purchasers. This rule flowed from another rule, that no man could grant to himself, or become a purchaser by his own grant. *Nemo potest esse agens et patiens*.

But in conveyances to uses and in wills, a person may make the heirs of his body, by that name, purchasers; since he alters the quality of the estate, to which these heirs would, as general heirs, be entitled by descent (c).

But when a man makes a limitation of the ultimate estate of the use in favour of his right heirs (d), and with or without any limitation of

(z) *Goodtitle v. White*, 15 East, 174; *infra*, 466.

(a) 1 Inst. 22 b; Watk. Desc. 268, 280.

(b) Watk. Desc. 269, 270.

(c) *Else v. Osborn*, 1 P. Wms. 387.

(d) 1 Inst. 10 a; *Bedford's case*, Poph. 3; *Fenwick and Mitford*, 1 Leon. 182; Mo. 284; Jenkins, Cent. 248; 2 Rep. 91 b; Cro. Eliz. 334; Hales' MSS. in Harg. Co. Litt. 22 b; 3 Leon. 406; *supra*, Ch. 3.

an estate of freehold (*e*) to himself, he takes the fee by resulting use; in the same manner, and subject to the same course of descent, as he held the estate in the land before he made the limitation to the use; and though he has previously limited the use to some stranger for his own life, still the fee will be in him by resulting use: and in those cases in which a limitation is to any person, though a stranger, for an estate of freehold; or he takes an estate of this quality, by implication of law; and there is afterwards, in the same deed or instrument, a limitation to his right heirs, the limitation to those heirs, as has been already shown (*ee*), will give the estate to the ancestor as a *vested or contingent interest* (*f*); and the heirs, whenever they become entitled under that limitation, must take in succession from him. To this subject, and the exceptions there are to the generality of these positions, a considerable portion of attention has been already paid, in treating of the rule in *Shelley's case* (*g*).

To resume the inquiry on what is the nature of an estate which passes by a limitation to the right heirs of a man, when these heirs are to take as purchasers *eo nomine*.

In the First Part of Lord Coke's Institutes (*h*), it is said, if a man hath issue a son, and dieth, and the wife dieth also; lands are

(*e*) Chap. III.

(*ee*) Ibid.

(*f*) *Tipping and Cozens*, 4 Mod. 380; 1 Lord Raym. 33.

(*g*) Chap. III.

(*h*) Page 13; but see 220 b.

letten for life, the remainder to the heirs of the wife, the son dies without issue; the heirs of the part of the father shall inherit, and not the heirs of the part of the mother, because it vested in the son as a purchaser.

Allowing the reason assigned, to be the ground on which the Courts would decide a case of this complexion, without any regard to a difference from circumstances, it must be admitted, that a limitation to the heirs of a man, as well as to the heirs of a woman, is open to the same reasons, and to be determined by the same principles.

It may be suggested, as probable, that Lord *Coke* meant nothing more than to draw the distinction between an estate to a woman by purchase, and an estate by descent; and, agreeable to this supposition, granting it to be well founded, it may be concluded, that the limitation to the wife received the construction made upon it, because, under the circumstances of the case, the limitation was contrary to the rules of law; and from the diversity taken in a subsequent part of this chapter, it is fair to infer, that a different construction may be made on a limitation to the heirs of a *man*.

The question on a limitation to the right heirs of a man is simply, whether the name of the individual is used merely to describe his heirs, to which the limitation is made *by his person*, as their name of purchase; or to describe *the heirs* which, in successive generations, are to

be entitled under the limitation ; and the case may, without any inconsistency, be decided one way as well as the other, though it is probable that the opinion so generally prevalent in practice, would govern the decision.

It is the peculiar form of the limitation, and the limited power of alienation conferred by the interest, which passes under a qualified fee, and not merely the boundary to which the right of succession, in a course of descent, is confined, which gives denomination to this species of fee. Did the boundary to which the right of succession is confined give a name to the interest, an estate descending from a father or mother, or any other ancestor, would, in the sense in which this term is now used, be a qualified fee.

Though an estate taken in this manner be qualified, as to the degree to which it may descend under the last grant of that estate, the power of alienation to be exercised in right of this estate, is general and unlimited ; and the estate, notwithstanding the peculiar and confined manner in which it is to be continued by succession in a course of descent, may be a fee-simple, and entitle its owner to convey the same to another person, with a general power of alienation, and with a right of succession to all his heirs, in every line, and in every degree ; and the estate, even in the tenancy of a person to whom it has once descended, may, after an intermediate alienation, vesting the fee in some other person, and a reconveyance by him, or

any one claiming under him, to the former owner, who took the same by *descent*, be a *fee-simple*, open to a general and indefinite succession, without any regard to the heirs on the part of the person from whom the estate originally descended, as the former owner.

Thus, if a person who has an estate by descent, levy a fine *sur grant et render*, or make a feoffment to another, and take a reconveyance to himself (*g*), he will have the *fee* by purchase; and that estate will be descendible to his heirs *generally*, without any qualification or restriction, and with a necessary preference of the heirs on the part of the father to the heirs on the part of the mother.

This doctrine supposes two distinct conveyances; whether they be fines, or any other assurances, is immaterial; one vesting the property in a stranger, and the other reconveying that property to the grantor. For when a conveyance is made to uses, whether the conveyance be by recovery, fine, feoffment, grant, release or confirmation, and the fee is expressly limited, or by implication of law results, to the former owner, this estate will be subject to the same course of descent, as it was before the conveyance (*h*). The estate in the land arising from the estate in the use, will follow the nature and qualities of the old estate in the land. So that if the estate conveyed to uses was

(*g*) Watk. Desc. 293; *Price v. Langford*, Carth. 140; Dyer, 311; pl. 84.

(*h*) *Supra*.

descendible, *ex parte materna*, or any other ancestor, the estate arising from the use will be descendible precisely in the same manner (*i*).

On the other hand, a qualified fee is confined in its extent, and confers a limited power of alienation; entitling the owner to give an interest of the same extent and continuance only in another person, that it would be in himself: so that the estate will, notwithstanding the transfer, be determinable, and into whose-soever hands it shall come, will cease on a failure of those heirs, to which, on the creation of the qualified fee, the limitation is made.

To proceed then to estates, properly termed qualified fees. It is a quality of this estate, that it will not descend, under the original grant, to all the heirs of the persons to whom it is granted. It will determine after a failure of those heirs who are within the prescribed degree.

The heirs in the prescribed degree, are not, however, in the same condition as *heirs in tail*.

The donee may alien to the exclusion of the presumptive heirs. Even while the heirs within the limited degree continue, it is not of necessity, that these heirs should take as heirs. Another person may become the heir to the estate, if, by a change of seisin, there should be a change of ancestor; as if an heir seised by descent should become seised by purchase, under a grant and regrant, &c. and then die, he would be treated as the purchasing ancestor, and his heirs succeed;

(*i*) *Fenwick v. Milford*, 1 Leon. 182.

though, on account of half-blood, or any other cause, they were not heirs of the original donee.

Besides, this qualified fee differs from an intail, since there may be an alienation by the ordinary modes of conveyance, without observing those requisites which are essential to alienation by donees in tail.

It is also a rule, that the limitation must not prescribe an order of succession from the purchaser, differing from the order of succession which the law has established (*j*). On this account, limitations to a man and his heirs *males*, or heirs *females*, or eldest heirs *females*, in deeds, and heirs of the part of his mother, or heirs, excepting his *eldest son* (*k*), are in all cases void, in this form, by the common law. The words descriptive of a mode of descent, varying from the order of descent which the law has prescribed, do not admit of any application by which they may be allowed to have effect. They are, for that reason, rejected.

These observations do not apply to descendible freeholds. There the occupancy or title may be conducted wholly through the line of males or females; and it is observable, that the heirs do not take merely *as heirs*; they take as occupants, or rather as persons *specially designated*. But the assimilation must be to an intail; and a *quasi* intail must be created.

(*j*) Litt. § 31; 1 Inst. 11; 9 Hen. VI. 25; 11 Hen. VI. 13; 1 Inst. 27 b; 18 Assiz. pl. 5; 18 Ed. III. 45 b. 46 a; *Abraham and Twig, Moor*, 424; *Prince's case*, 8 Rep. 14.

(*k*) Fearn's Post. Works, 200.

In wills, a gift to one and his heirs males, or heirs females, passes an estate in special tail, as will be observed when estates-tail are considered. In this instance, the words "of the body," are supplied in favour of the supposed intention; and the limitation does, by that construction, designate a succession conformable to those rules, under which a title by descent may be made to estates-tail of a certain description.

As to lands, which, from their local situation and the custom of the place, are subject to a peculiar order of succession, it has already been observed, that regard must be paid to the law of the place, and that an attempt to divert that order of succession, would be as vain and fruitless as an attempt to vary the order of succession to lands which are the objects of the general rules of the common law.

Thus, to convey lands in gavelkind (*l*) (which entitle all the sons *equally*) to *A* and his *eldest* heirs, with a view to give a preference to the *eldest* son, in exclusion of the *younger* brothers, will not accomplish the intention of the parties. The custom cannot be defeated. On this account the word *eldest* will be rejected.

These observations must be confined to descents.

By purchase, any class of customary heirs may become purchasers, under the customary denomination or character (*m*).

(*l*) 1 Inst. 27 b; 4 Com. Dig. 5.

(*m*) Hob. 31; *Pybus v. Mitford*, 1 Ventr. 72. Per Grant, M. R. in *Cholmondeley v. Clinton*, 2 Merr. 171.

And if customary or copyhold lands, descendible contrary to the rules of the common law, be limited to right heirs as purchasers, the law will prefer the common law heir, and deem him to be the purchaser (*n*); unless the donor has expressly designated the customary heir as the purchaser (*o*). But when the customary heir is, in express terms, the object of the gift, as the right heirs in gavelkind, right heirs in borough English, &c. (*p*), the customary heirs may take under this express designation.

The order of succession to the Duchy of *Cornwall* furnishes neither argument nor authority against the positions which have been advanced. The grant was by the King to his eldest son, and to the first begotten son of that son, and of his heirs being kings of *England*, about to succeed to the kingdom of *England*, and the grant was confirmed by parliament, and consequently, by adoption, became a grant by the legislature.

When the validity of this grant was discussed (*q*), it was agreed that it would not have been good without such confirmation. It is obvious that this is an anomalous case, and is an exception to the general rule, owing its effect to the transcendent authority by which it was confirmed, and the operation of the confirmatory statute. This statute, as to this gift,

(*n*) *Roberts and Dixwell*, 1 Atk. 607; *Watk. Desc.* 223, note d. Co. Litt. 10 a, note 4.

(*o*) *Rob. Gavelk*, L. 1. c. 6. 117. (*p*) *Hob.* 31.

(*q*) *Prince's case*, 8 Rep. 16; 1 Inst. 27 a.

virtually altered the common law, so far as to establish this gift by way of exception to the general rule. The discussion which has lately, (1795, 1796, while this Essay was in the progress of revision,) been entered into on the nature and qualities of the estate of the Prince in the Duchy of *Cornwall*, invites some observations on that estate.

It seems to have been argued in the consideration of the Prince's case, reported by Lord *Coke*, that the Prince has an estate in fee in the Duchy of *Cornwall*, and not merely a fee-tail. This doctrine is open to many observations, which the Author refrains from introducing at this period.

To entitle the Prince, the following circumstances must concur.

- 1st. He must be Duke of *Cornwall*.
- 2d. He must be the eldest son for the time being of his father ; and therefore, if the eldest son die in the life-time of his father, without issue, the second born son will be entitled.
- 3d. He must be the son of a king of England ; and therefore, when a Prince of *Wales* dies in the life-time of his father, being King of *England*, the eldest born son of the Prince of *Wales*, cannot entitle himself under the terms of this limitation, because his own father was not king of *England*. On the other hand, if there be grandfather, father, and son,

and the grandfather be King of *England*, and the father Duke of *Cornwall*; and the grandson is the first born or elder surviving son of his father, then on the death of the grandfather, the father will become King of *England*, and the grandson will become Duke of *Cornwall*, and entitled under this limitation; because he fulfils in his person the qualification of being the heir apparent of his father, who is King of *England*.

- 4th. This eldest born son for the time being must, by right of inheritance, be entitled to succeed to the crown and realms of *England* on the death of his father; consequently, the existence of issue of an elder son, will suspend the right of a second born son, though the eldest son be dead, to be Prince of *Wales*.

During the vacancy of an owner under this limitation, the estate in the Duchy lands is in the Crown, by way of *reversionary* ownership; consequently, when there is not any Duke of *Cornwall*, the fee-simple is in the King or Queen for the time being; not merely, it is apprehended, by way of chattel interest, but as a fee-simple, and as a consequence of that dominion or ownership and ultimate property, of which there has not been any complete and effectual disposition.

Every qualified fee is also a determinable one; and the observations already offered in regard to that estate, and the means by which it may become simple and absolute, will point to the means by which this estate may become general, in other words, descendible, to all the heirs of the tenant, without any qualification.

A release of the possibility of reversion to the owner of this estate, after it has once been taken in a course of descent, will give rise to a question. It is open to doubt, whether the descendible quality of this estate would be altered in regard to the first purchaser. It should seem, that although the quality of the estate would be changed, still the first purchaser of the seisin would be deemed the purchasing ancestor.

Thus the power of alienation would be of the fee-simple absolutely, while the descent, though in fee-simple, would be restricted to the heirs of the first purchaser. It would be to all his heirs, without any qualification, instead of being restricted to his heirs under the original qualification.

This point is at least questionable.

Goodright v. Searle (*r*), and *Goodtitle v. White* (*s*), are referrible to fees determinable by executory devise, and the like conditional limitations, and not to qualified fees.

They are also confined to descents, and not

(*r*) 2 Wils. 36.

(*s*) 15 East, 174.

extended, at least in decision, to releases of the executory interest conferred by the conditional limitation.

They decide, that the mere descent of the interest, under the conditional limitation to the owner of the vested fee, will not so blend and extinguish the contingent interest, in the vested interest, as to cause a cesser of the contingent interest.

But if the vested interest be descendible to the heirs *ex parte paterna*, and the contingent interest be descendible to the heirs *ex parte materna*, and the event on which the contingent interest is to vest should arise, then, notwithstanding the union, the descent will be governed by the gift of the contingent interest, and not by the gift of the vested interest.

This is an anomaly. The case is not easily reconcileable to any principle of law; and the determination in *Goodtitle v. White*, would have been carried to the Court of Appeal, had the property been of sufficient value to justify the expense.

Lord *Ellenborough*, in *Goodtitle v. White* (*t*), admitted, that it would possibly have been of no great prejudice, when the question was first raised, if the concurrence of two such interests in the same person had been held to coalesce. The criticisms on this case will be found in 3 Conveyancing (*v*).

This *qualified fee*, while it continues, will;

(*t*) 15 East, 199.

(*v*) P. 494, 495, 496.

in point of duration, cease on the failure of the heirs who fall within the given description. Though the estate be determinable, it is more properly distinguished as a qualified than a *determinable* fee; since it is qualified or confined to certain or particular heirs of the person to whom the conveyance is made, and does not extend to, or embrace, all his heirs generally.

It is of the former description, *viz.* determinable; because it is liable to determine as a consequence necessarily arising from the nature and form of the gift. It has another quality restraining it to certain heirs in the course of its devolution and descent; and the denomination descriptive of this quality, is more properly used in giving denomination to the estate.

The denomination of a qualified fee applies, it is conceived, to those estates only which, *by the terms of the gift* at its origin, are limited with a qualification.

A conveyance to a man who is a *bastard*, or *denizen* and his heirs, gives an estate which, in its descent, is, as to him, necessarily confined to the issue of his body; and yet his estate is a fee-simple, and confers an unlimited power of alienation. And any person deriving a title under a conveyance from the bastard or his heirs, or the denizen or his heirs, may transmit the estate in perpetual succession. And yet the law so far adverts to the circumstances of a denizen or a bastard, that a limitation over on failure of the heirs of a bastard or denizen, after a gift

by will to a bastard, or a denizen and his heirs, would convert the gift into an estate-tail (*u*).

Though, as to the person to whom the estate is first given, a qualified fee may not, under the original limitation, descend to any of his heirs besides those which fall within the terms of the limitation; yet, on a conveyance to a stranger, or on a change of seisin, even in the heir, the estate assumes, in every particular, the quality of a determinable fee.

Like all other fees determinable on a collateral event, it will cease when that event shall happen; and, in the case supposed, this event will be, when there shall be a failure of those heirs to which the limitation is restricted. In the mean time, the estate will descend to any of the heirs of the person to whom the conveyance is made, without the least regard to that degree within which it is confined while in the tenancy of the first purchaser.

From a passage in *Blackstone's Commentaries* (*x*), it may be doubted whether there be any estate of this denomination.

It is submitted, that the authority of *Littleton*, and of Lord *Coke*, in his *Commentary* on the text of this eminent lawyer, establish, in the most decisive manner, the certainty of its existence.

The language of *Littleton* (*y*) is, "if a feoffment be made upon condition that the feoffee shall reenfeoff many men, to have and to hold

(*u*) 3 Bulst. 195; 1 Lord Raym. 1152.

(*x*) 2 Bl. Com. 222.

(*y*) § 354.

to them and their heirs for ever, and all they which ought to have estate, die before any estate made to them, then ought the feoffee to make estate to the *heir* of him which *survives* of them, to have and to hold to him and to the heirs of him which surviveth."

And Lord *Coke* (z), in his Commentary on the text of *Littleton*, in the section which has been cited, observes, that questions had been made, wherefore the *habendum* is not to the *heirs of the heir*; and for what reason it is, by *Littleton*, limited to the heirs of the survivor; and he resolves these doubts; declaring, that if it were made to the heirs of the heir, then some person by possibility should be inheritable to the land, which should not have inherited if the estate had been made to the survivor and his heirs, and consequently the condition broken. Afterwards he puts this example, which can be properly understood, only by referring to the law on the succession to property by descent. "If the survivor took to wife *Alice Fairfield*, in this case, if the limitation were to the son and his heirs, then if he should die without heirs of his father, the blood of the *Fairfields*, being the blood of his mother, should inherit. But if the limitation be to the *right heirs of the father*, then should not the blood of the *Fairfields*, by any possibility, inherit: for then it is as much as if the estate had been to the survivor and his heirs; and therefore," he says,

(z) 1 Inst. 220 b.

“ those words, ‘ and to the heirs of him who surviveth,’ which many have thought superfluous, are very material.” And he enforces on the remembrance of his readers this kind of fee-simple, by remarking, that it is worthy of their observation.

It is clear that the estate passing under the limitation to the heirs of him who surviveth, gave the fee to the person who was the heir of the survivor of those, who, agreeable to the words of the condition, were to be enfeoffed : and the admission that the heirs of the sons, on the part of his mother, were excluded from all right of succession, unequivocally shows, that the son had a fee, with a limited and qualified right of succession ; embracing all his heirs on the part of his father, and excluding all his heirs on the part of his mother.

If a qualified fee be *created*, then there is not the same degree of interest as if the fee-simple had been conveyed.

It is observable, that if the survivor had taken the fee-simple, his heir could have aliened the land in fee-simple, and on the failure of heirs, the lands would have *escheated* ; while, if a qualified fee be limited, the grantee can never convey a fee-simple ; and there will be a possibility of reversion in those who reenfeoff. This seems contrary to the intention, as between the grantor and those who are to take under the reenfeoffment ; and this rule is not observed by courts of equity, - in decreeing the

execution of trusts. And as the grantor is not prejudiced, and the effect of a grant of a fee-simple would only be to enlarge the right of succession in the *heirs*, the soundness of *Littleton's* doctrine, would, without the sanction of Lord Coke, be questionable.

It is laid down by Lord Coke, in a former part of his *Institutes*, (as on his authority and the authority of the Year Books, to which reference is made, it is in a former part of this chapter,) that when lands are given to a man, to hold to him and his heirs *on the part of his mother*, the heirs on the part of the father shall inherit.

The acknowledged ground of these authorities is, that no man can institute a new kind of inheritance not allowed by law; and all agree that the words "on the part of the mother," are void, and to be rejected.

Also, under a gift by one man to another and his *heirs male*, with an intention to create a fee-simple, descendible to males only, the law rejecteth the word males, because there is not any such kind of inheritance. This is spoken of the common law; for intails in pursuance of the provisions of the statute *de Donis*, may communicate an inheritable quality, which will entitle males only, in a regular series, to be called to the succession, in exclusion of females.

The proposition, assuming it to be law, of *Littleton's* text, introduced under this head,

may, on a first impression, appear contrary to the doctrine of the positions in a former page, advanced on the authority of Lord Coke's Institutes. The several cases may be reconciled. The difference by which they are to be distinguished, may be expressed in these terms.

When the limitation of an estate in fee is so expressed, as to direct its descent in a course different from that which the law has ordained, the words prescribing the order of succession, will *be rejected*, on the ground of repugnancy to the quality of the estate.

On the other hand, when the limitation (as in the case noticed by *Littleton*) is to the heirs of the *father*, or of any other ancestor in that line, or in any other manner to a greater extent; as into part of the line on the side of the mother (so as preference be given to all the heirs in the line of the father) the gift will be good in the special form in which it is made; and the words which are added to describe the mode in which the estate shall descend, and the extent of which that estate shall be, will not be rejected; they will be retained, and have the effect of that intention from which they originate. Of consequence, the heirs on the part of the mother, and, in all other cases, the heirs on the part of those ancestors who are not within the limited degree, will be *entirely excluded* from all right of succession to the estate under the original gift, while that gift

regulates the order of succession ; because that limitation restrains the descent to particular heirs, of a description within which they do not fall.

In *Littleton's* case, the course of descent prescribed by the limitation, does not vary the course of descent prescribed by the general rules of law. The course is bounded only, and not diverted or turned out of its proper channel. The limitation merely stops the course at a certain point. For that reason it is good in its special form. It gives a boundary to the descent ; and when the estate has descended through all this line of heirs, the estate will determine.

Suppose, in a case like that proposed by *Littleton*, the surviving ancestor had been a female, it would be natural to inquire in what manner a conveyance to her heir, in performance of the condition, ought to be penned.

In this case there is every reason to conclude, that a conveyance to the heir, and *his heirs generally*, would not be a breach of the condition, as it is in the instance in which a *man* is the survivor.

On the contrary, in the supposed case, a limitation to the heirs generally, seems most proper for the performance of the condition.

The reason is sufficiently obvious.

In the latter case, the law will not allow the conveyance to be in any other manner. A conveyance in the form most consonant to the intention of the parties, would contravene the

general policy of law. This objection cannot be urged against the case stated by *Littleton*.

The rule of the common law is, you shall not make a person heir, or give him the character or the rights of an heir, by a special limitation, unless he be the heir by the rule of law. The statute *de Donis* gave the donor, with reference to estates-tail, the power of making special heirs inheritable under the intail.

This qualified fee can become simple and absolute only, by a release or some other conveyance of the reversion, or possibility of reversion. No event, without the accession of a further interest, or the release of the possibility, can alter the determinable quality of the estate.

A *conditional fee (a)*, in the more general acceptance of the term, is when, to the limitation of an estate, a condition is annexed, which renders the estate liable to be defeated. In this application of the term, either a determinable or qualified fee may, at the same time, be a conditional fee.

A fee-simple, it has been already observed, excludes all conditions and qualifications. An estate to a man and his heirs for ever, subject to a condition, is a conditional fee, or a fee subject to a condition, as long as the condition may affect the estate. The existence of the condition precludes the estate of that sim-

(a) 10 Rep. 95 b.

plicity, which is the essential quality of a fee-simple.

The learning on conditions will elucidate these positions.

The only observation necessary on this head, is, that the estate to which the condition is annexed, may, in reference to the condition, become simple, by the performance of the condition, or by a release thereof, *eo nomine*, before broken; or of the right of entry, after that right has arisen, by a breach of the condition, or by a confirmation.

Also an estate limited to a man and his heirs, to commence on the performance of a condition (*b*), is frequently described by this appellation. It may, with greater accuracy and precision, be distinguished by the appellation of a limitation on condition, or rather contingency. As the condition or contingency must happen before the grantee can have any right, a release, or any other act of the grantor or his heirs, except a *new conveyance*, will not complete the title. It is necessary that the event should happen, to give a title under this contingent, or *conditional limitation*. *Though the event, on which the estate is to vest, should become impossible by the act of God, yet the gift would fail*; while if a condition be annexed to an estate already vested, and the condition become impossible, the estate would be dis-

(*b*) By Lord Mansfield, in *Buckworth and Thirkell*, 1 Coll. Jurid. 332; Fearne, 9.

charged from the condition, and become absolute (c).

The estate at this day most frequently expressed by this term, arises from a gift to a man or a woman, and the heirs of the body of the donee; or from a gift to two persons, and the heirs of their two bodies, of an *hereditament*, which is not a tenement, and therefore not within the statute *de Donis*. Annuities not being rent-charges, are of this description. Gifts of this sort lead to the consideration of estates-tail, and will be reserved as an introduction to the learning on estates of that denomination.

Although as a general proposition it be true, that a tenant in fee has an unlimited power of alienation, and cannot be restrained by condition (d); yet, every restriction of this power, annexed to the creation, or to the transfer of an estate in fee, would not be absolutely void.

All that *Littleton* has advanced (e) is, “that if a feoffment be made upon this condition, that the feoffee shall not alien the land to *any*, this condition is void; because, when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by law; for if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason;

(c) 1 Inst. 206 a b.

(d) Ib. 206 b, 223 a.

(e) Litt. § 360.

and therefore such a condition is void." But a reasonable restriction may be imposed on the power of alienation.

As a condition not to alien to a particular person, or his heirs or issue (*f*); or not to alien for a *certain time* (*g*), confined within reasonable limits, (and the limits prescribed by the rules against perpetuities, seem to be those which are reasonable,) is a valid condition. But in lands of copyhold tenure, customs respecting the power of alienation are common, and are valid. They enlarge, not diminish, the common law right; for, by the common law, without an express custom, a copyholder cannot lease for more than one year, except by licence of the lord.

A condition not to alien, except to a *particular* person, has heretofore been deemed questionable (*h*). A condition, that the feoffor should enfeoff a *particular* person, or two persons, is good (*i*); and so is a condition not to alien, except to a particular person (*k*). And *Littleton* admits (*l*), "that if the condition be such, that the feoffee shall not alien to *such a one*, naming his name, or to any of his heirs, or of the issues of such a one, (*mes si le condition soit tiel, que le feoffee ne alienera à un tiel, n'ayant son nosme, ou à aucun de ses heires, ou des issues*

(*f*) Litt. § 361; 1 Inst. 223. (*g*) Shep. T. 126, note 1.

(*h*) Lord Nottingham's MSS., *Muschamp's case*, Bridg. 132; 1 Inst. 223 a.

(*i*) Litt. § 3.

(*k*) *Doe v. Pearson*, 6 East, 173.

(*l*) § 361.

d'un tiel), &c. or the like, which conditions do not take away all power of alienation from the feoffee, &c. then such condition is good."

It may also be observed, that all the estates which have been noticed, severally confer a power of alienation, to the extent of the *interest*, and for the quantity of time, they comprise.

The only difference between the effect of an alienation by a tenant in fee-simple, and of an alienation by a tenant of a fee, which is determinable, qualified, or conditional, is, that in the instance of a fee-simple, the estate will be held by the grantee, on those terms only which are expressed in the grant to himself; in the other instances, the terms on which the estate is held by the person from whom the owner derives his title, will form a collateral quality to the estate conveyed to him. *Nemo potest plus juris in alium transferre, quam ipse habet*, is the maxim.

No estate is deemed a fee, unless it *may* continue for ever.

The interest which, with reference to the time of its continuance, is circumscribed by the period of a life, or the period of several lives (*m*), is merely of freehold, and not a fee.

A limitation to a man and his heirs, during the life of *C*, or during the lives of several persons, does not pass an estate in fee.

(*m*) See examples, Ch. Life.

It conveys an estate merely of freehold. Though the estate may be taken in succession, or rather by transmission to occupants, during its continuance, the limited period to which it is confined, classes it among estates for life (*n*).

The estate conveyed by a limitation in these terms, is not strictly of inheritance. It is merely of freehold, with a descendible or transmissible quality (*o*); and the heirs, if *specially named*, otherwise, in most cases, the *executors* or administrators, will be entitled as occupants (*p*).

It is one of the essential qualities of an estate in fee (*q*), that it may continue for ever. For this reason, an interest granted to a man and his heirs; but so qualified, that the continuance of the same under the limitation is bounded by the life of one person, or the lives of several persons, is not an estate in fee, for it *cannot* continue for ever.

A limitation to *A* and his heirs, during the life of *B* (*r*), or till an event shall arise which must happen, and necessarily must take place within the period of a life, or the period of one of *several lives*; as an estate to *A* and his heirs, during the widowhood of *C*, is an estate of mere freehold, and not of inheritance (*s*).

That a limitation of this sort may not be

(*n*) Bract. lib. 2. c. 9; Vaugh. 201.

(*o*) *Chudleigh's case*, 1 Rep. 140 b; 10 Rep. 98; 2 Bl. Com. 259.

(*p*) 29 Chas. II. c. 3; *Lowe v. Barnet*, 3 P. W. 262; *infra*, ch. Estates for Life; 1 Abst. p. 436.

(*q*) 10 Rep. 97 b. (*r*) 1 Rep. 140 b. (*s*) 1 Inst. 42.

confounded with a limitation to one and his heirs, till the return of another, which clearly passes an estate in fee, it must be observed, that the widowhood of a woman will cease, either in her life-time by her marriage, or at her death; and it is certain that she will die, and of consequence, that her estate will not continue beyond the period of her life. Whether the event of the return of a person will take place, is *uncertain*; and this occasions the difference between those limitations of *indefinite* time which do, and those which do not, pass an estate in fee.

So an estate to *A* and her heirs, or to another and his heirs, till *her marriage*, will give a determinable fee; for it is uncertain whether that event will ever happen; *and, unless it should happen*, the estate will by the event become absolute. A limitation of this sort differs from a gift to a woman during widowhood (*t*).

A gift during widowhood, is, by construction of law, to determine on the death of *A*, or, which shall first happen, on her marriage; and for that reason, is merely an estate for life, though limited to her and to her heirs; hence an estate to *A* or *B*, and his or her heirs, during widowhood, will, notwithstanding the limitation to *the heirs*, determine on the death of *A* or of *B*, unless it should determine, in the mean time, by her marriage.

The mere possibility, that an interest limited

(*t*) And see *supra*, p. 41, note *d*.

to a man *and his heirs*, may determine within the period of a life, or the period of several lives; as to *A* and his *heirs*, till his marriage, or till his return from *Rome*, or till *B* shall attain twenty-one; will not qualify the interest into an estate of mere freehold.

Admit it to be possible that the interest *may* continue for ever, and it will follow, that the interest is a fee to all intents; and it will be deemed an inheritance, or estate, which may be enjoyed in continual succession.

A limitation to a man and his heirs, *so long as ANOTHER person shall have heirs of his body*, conveys a fee (*u*).

The estate created by this limitation, may determine by the death of the person, and failure of his issue; and yet he is not tenant for life only: *B* may have heirs of his body; and it is possible, that, by succession from generation to generation, there may not be a failure of those heirs within any period of time. For this reason, a limitation in these terms passes an estate in fee, determinable by the failure of issue.

The material difference is between an estate, which, in its duration, is bounded *with certainty* (*w*), by the period of a life, or the period of several lives; as an estate to *B* and his heirs, during the life of *C*, or the lives of *C* and *D*, or during the widowhood of *C*, or till *A* shall

(*u*) Plow. Com. *supra*.

(*w*) Shep. Touch. 522.

come from beyond the sea, and attain his full age, or die (*x*); and an estate which *may continue* for ever, and, at the same time, is of a quality liable to be determined by an event which may happen within the period of a life; as a limitation to a man and his heirs, *till his marriage*, or *till his return* from a place at which he then is, or any other event, however near, or however, in all probability, remote.

In the former instance, the interest expressed by the limitation is, in point of duration, bounded and circumscribed with certainty, by the continuance of a life; and is, in quantity, merely an estate for that *period*. In the latter examples, the estate may continue for ever, and is of inheritance; liable only to determine on an event which may take place within the period of a life; but will not certainly happen during that period.

This point will be insisted on more fully in treating of Estates for Life; and reference must be had to that chapter.

The extent of an estate in fee, and the perpetuity of time it comprises, leaves nothing, in point of time or estate, to remain in the person who limits an interest of this quantity (*y*); for as was observed by the Lord Keeper in *Burgess v. Wheate* (*b*), when you have limited an estate to a man in fee, or declared the trust to him in fee,

(*x*) Shep. Touch. 522.

(*y*) 10 Rep. 97; *Hearn v. Allen*, Cro. Car. 57; 1 Eq. Abr. 186.

(*z*) 1 Black. Rep. 177.

you have no more to dispose of in either case, and cannot limit one fee on another.

Even on a conveyance of a determinable or qualified fee, the entire property of the land is transferred to the person to whom the conveyance is made, though there may be a possibility that the land will revert to that person. Hence the maxim of the common law, that *no estate may be limited in remainder of a fee-simple*; or, as Lord Coke expresses the rule (*a*), one fee-simple cannot depend on another by the grant of the party; and the rule, as it will be shown, is equally applicable to other fees as well as fees-simple.

The text of *Littleton* (*b*) is, that a man cannot have a more large or greater estate of inheritance than fee-simple; and Lord Coke, in commenting on this text, lays it down, that the doctrine extends, as well to fees-simple conditional and qualified, as to fees-simple pure and absolute; and he gives this example of its application.

If land be given to *H* and his heirs so long as *B* hath heirs of his body, remainder in fee, the remainder is void (*c*).

No authority is cited by Lord Coke for this position; and Lord Ch. J. *Vaughan* (*d*), cer-

(*a*). 1 Inst. ; Fearn 8; Butler's Fearn, 373.

(*b*) § 11; Dyer, 4 a, 33 a, 330; 1 Rep. 35 a; Pells and Brown, Cro. Jac. 591; 3 Atk. 774; Ambl. 204; Fearn 342-9; Cro. Car. 57; Cro. Jac. 695; Bray and Hill, 1 Lord Raym. 326; 1 Inst. 18; *Stafford v. Bulkeley*, 2 Ves. 180; 10 Rep. 97 b.

(*c*) 1 Inst. 18.

(*d*) *Gardener v. Sheldon*, Vaugh. 269.

tainly doubted the accuracy of the conclusion. Arguing on the case in question, after explaining it to be a remainder expectant on a fee-simple, though that fee-simple is to determine when no heirs are left of the body of *B*; he says, "Whether that case be law or not, I shall not now discuss: in regard, that when a base fee determines for want of issue of the body of *B*, the land returns to the grantor and his heirs as a kind of reversion (*e*); and if there can be a reversion of such estate, I know not why a remainder may not be granted of it:" and afterwards he proceeded to observe, "Without question, a remainder cannot depend upon an absolute fee-simple by necessary reason; for when all a man hath of estate, or any thing else, is given or gone away, nothing remains: an absolute fee-simple being given or gone out of a man, that being all, no other, or further, estate can remain to be given or disposed of; and therefore no remainder can be of a pure fee-simple."

On Lord *Vaughan's* doubt (*f*), it may be remarked, that there frequently occur in our books on the law prior to the statute *de Donis*, limitations of remainders after gifts of conditional, being also qualified, fees, which are cases to this point.

Thus, a person seised in fee-simple, would

(*e*) *Fearne*, 7, 285; 2 *Abstr.* 103; 3 *Abstr.* 254.

(*f*) *Bracton*, 18 a b; 2 *Inst. on Stat. de Donis*; *Fitz. N. B. on Formedons*; but see 3 *Rep.* 3 b.

make a gift to *A*, his eldest son, to hold to him and his heirs *begotten of his body*; and if he had no such heirs, or they should fail, then to his second son *B*, to whom he directed it to revert, to have and to hold to him in the same manner; and on like failure, to *C*, his third son, in the like way, and so on; and if *A*, *B*, and *C*, should all die without such heirs, then the land to revert to the donor and his heirs, which last was unnecessary, says *Reeves*, in his *History of the English Law*, as the law would give the reverter to him (*g*).

But though Lord *Hardwicke* admitted (*h*), that no remainder could be created of any estate not within the statute *de Donis*; for before, it was a possibility of reverter, out of which a remainder could not be; upon this notion, that being but a possibility, it could not be grantable over; yet he added, that if before the statute *de Donis*, a man had granted lands to another and the heirs of his body, and said, in default of such issue, over to *B* and his heirs, that grant over had been void, and on having issue, the condition had been performed, and the grantee himself might have aliened, so as to have barred the possibility of reverter.

The practice of limiting the use of copyhold lands to one and his heirs of his body, and after-

(*g*) *Reeves*, 295; *Lex Custum.* 170; *Butler on 1 Inst.* 274 a; *Jenk. Cent.* c. 5.

(*h*) *Earl of Stafford v. Buckley*, 2 *Ves. sen.* 171.

wards to another person (*i*), and the succession of the several persons accordingly, seems to furnish an argument in support of the doctrine cited from *Reeves*. But this particular instance of copyholds is generally, and perhaps most correctly, referred to the assimilation of property (*k*); to put the limitations of freehold and copyhold lands on the same footing, notwithstanding freeholds alone were the express objects of the statute of Intails.

It is a strong authority too, even against such limitations over, as those of which *Reeves* has taken notice, that, in the opinion of Lord *Coke*, they had no remedy at the common law (*l*). This writer asserts, that, at the common law, there was not any *formedon* in remainder, while, it may be observed, there was at the common law a *formedon* in reverter.

Gifts are continually made in conveyances to uses, after and expectant on a determinable fee; as to the use of *A* and his heirs, till his marriage, with limitations over, &c. which are clearly good (*m*) but the subsequent limitations do not pass remainders. The limitations over take effect by springing or shifting use.

However, the current of authorities (*n*) has clearly settled the law to be, that a fee may not, by the grant of the party, be limited with

(*i*) Watk. Copyh. vol. i. 148, 156, 158.

(*k*) 3 Rep. 7, *Heydon's case*.

(*l*) 2 Inst. 336, on stat. *de Donis*.

(*m*) Leon. 33.

(*n*) Tr. of Eq. 61, § 6.

effect to depend on, and to take place after, a fee not being an estate-tail, so as to be a remainder under a conveyance at common law (*o*); and the same observation applies to limitations, or declarations of use and of trust. Still it is clear, that, *at common law*, there may be two concurrent fees; the latter to take place, in case the former should fail of effect, and *never vest in interest (p)*.

As a lease or devise to *B* for life, remainder to *C* and his heirs, if *B* should die in his life-time; and in case *C* should die *in the life-time* of *B*, then to *B* and his heirs. *Luddington* and *Kime*, and *Doe v. Burnsall*, are in point, and have clearly established the position, that one estate in fee may be substituted in the place of another; and always, as well while it is in contingency, as after it becomes vested, the remote or alternate remainder, has the denomination, and all the relative qualities, of a *remainder*; but of necessity, the alternate remainder, so far as it is an alternate remainder, must give a contingent interest (*q*), till it is certain that the interest, in lieu of which it is to be substituted, cannot take place; and therefore it may be destroyed by the discontinuance of the fee out of which it is limited, or the destruction or merger of the particular estate, on which it is to depend.

Another point to be understood is, that the

(*o*) *Burgess v. Wheate*, 1 Black. Rep. 177.

(*p*) *Luddington and Kime*, 1 Lord Raym. 203; *Doe v. Burnsall*, 6 T. Rep. 30.

(*q*) *Doe v. Burnsall*, 6 T. Rep. 30.

several limitations of the fee, must be after, and in remainder, of a preceding particular estate. The rules applicable to the point under consideration are, that a fee may not be limited in remainder of a fee, by a conveyance at common law; and that a stranger may not take advantage of a condition annexed to an estate. But neither of these rules can be fairly urged with success, to preclude a *concurrent fee* from effect, in case the fee previously limited should not vest in interest.

The ulterior limitation, is not to give a remainder expectant on the fee, previously limited to take effect on an event. The substituted fee is limited in remainder of the particular estate on which the fee first limited is, by the terms of the grant, to depend; and the latter fee is not to defeat the former estate of that quantity, but to vest and take place only in the event that the limitation; which is to give a title to that estate, should fail of effect, by reason that the contingency on which that gift (*r*) is to commence in interest, should not happen.

In *Luddington and Kime* (*s*), Sir *Michael Armyn* devised the manor of *Willoughby* to *Evers Armyn* for life; and if he should have any issue male, *to such issue male and his heirs*; and if he should die without issue male, then to Sir *Thomas Barnardistone* in fee; and it was

(*r*) 3 Ch. Cas. 31.

(*s*) 1 Lord Raym. 208; see also 8 Mod. 252. 382; *Strange*, 798; *Doe v. Burnsell*, 6 Term Rep. 30.

held, first, that *Evers Armyn* had a mere estate for life, with a contingent remainder to his issue ; and *Evers Armyn* having suffered a common recovery before the birth of any issue male, the question was, whether the estate limited to Sir *Thomas Barnardistone*, was a vested or contingent remainder, or an executory devise; and it was agreed and determined, that it was a remainder. Then *Evers Armyn* being tenant for life, by suffering the common recovery, had forfeited his estate ; and it was objected, that Sir *Thomas Barnardistone* might take advantage of it, and that if it was an executory devise to Sir *Thomas Barnardistone*, the recovery would not bar (*t*); but it was agreed, that if it was a contingent remainder, then it was destroyed by the recovery which had been suffered ; and it was held by *Treby* and *Powell*, that this was a plain contingent remainder : and they held, that the first remainder was a contingent fee to the issue male of *Evers Armyn*, and that the limitation over to Sir *Thomas Barnardistone* was contingent also, not *contrary to*, but *concurrent with*, the former, according to the notion in *Plunket* and *Holmes* (*u*), and was a contingency with double aspect. For, as they said, if *Evers Armyn* had issue male, then the remainder would have vested in his issue male in fee ; and if he died without issue male, that is to say, (as *Treby*, Ch. Justice, observed), if he never had issue male, then to Sir *Thomas*

(*t*) See *Pells* and *Browne*, Cro. Jac. 590. (*u*) Sir T. Raym. 18.

Barnardistone in fee ; and that these are not remainders expectant, the one to take effect after the other, but were cotemporary (*x*).

Preparatory to his introduction of *Luddington* and *Kime* (*y*), Mr. *Fearne*, in his Essay on the Learning of Contingent Remainders, observes, that although a fee cannot, in conveyances at common law, be mounted on a fee, yet, two or more contingent fees may be limited, merely as *substitutes* or *alternatives*, one for the other, and not to interfere ; but so *that one only may* take effect ; and every subsequent limitation be a disposition, *substituted* in the room of the former, if the former should fail of effect ; and this very able writer cites the case of *Luddington* and *Kime*, as an authority in point.

That this case may not be confounded with the case of *Denn* ex dem. *Webb* v. *Puckey* (*z*), (to be introduced in the next chapter of this Essay) before the lines of distinction between the two cases are accurately examined, the reader must observe, that the devise to the *issue* was introduced with words of contingency, provided there should be such *issue male*, and that the limitation was to his *heirs*, thereby fixing on him as an individual person ; and that the words and if he should die without *issue male*, taken in context with the preceding parts of the will, refer to the event, that there should not be any such *issue male*, and not to a general and inde-

(*x*) Dougl. 487, n. 2.

(*y*) 1 Lord Raym. 203.

(*z*) 5 Term Rep. 299.

finite failure of the *heirs male* of the father or ancestor. Till the authority of *Luddington* and *Kime*, (as far as respects that part of the opinion of the Chief Justice, in *Denn v. Puckey*, by which he inclined to consider that case, namely, as giving an estate-tail to the parent of the issue,) shall be overruled, it is to this mode of reasoning alone that recourse must be had, in order to distinguish between *Luddington* and *Kime*, and *Denn* and *Puckey*, as cases nearly similar in expression, furnishing distinctions, and authorities for different conclusions.

It may also be noticed in this place, that the same gift may, in a will or declaration of uses or trusts, be a contingent remainder as to the particular estate, and an executory devise, or a shifting use or trust, as to another estate.

And as far as it is a remainder of a legal estate, it may be destroyed while it is in contingency; and it will fail of effect even as an executory devise, if the fee for which it is substituted, should be defeated as a contingent remainder, while it has that character (*a*).

But after the fee has once vested, then the substituted fee has gained a protection from destruction. It is now to be considered, merely and simply, as an executory devise; and is no longer exposed to the danger and consequences of being a contingent remainder, and liable to destruction.

(*a*) *Doë v. Halley*, per Lord Kenyon, 8 Term Rep. 10.

In *Doe ex dem. Davy v. Burnsall* (*b*), the substituted fee being destroyed as a contingent remainder, it failed of operation as an executory devise, though the event happened, on which the gift by way of executory devise was to have effect.

As between the tenant for life and the remainder-men, the rules of the common law govern their interests; while the protection afforded to executory devises from destruction, is applicable only as between persons, whose interests depend on a title, subject to this learning.

If, in *Doe v. Burnsall*, the gift had been *in terms*, or in effect, and by reason of a *context*, to the children for estates-tail, then the remainder would have been vested, and could not have been destroyed.

And it has frequently been determined, that a vested estate in fee may be superseded by another estate, within a limited period, under the doctrine of uses, by the limitation of a shifting use; and, under the doctrine of wills, by an executory devise. But interests arising by these means are, in reference to the estates they defeat, gifts by executory devise, or shifting use, and not remainders (*c*).

(*b*) 6 Term Rep. 30.

(*c*) 2 Black. Com. 334; Saunders on Uses, 187; Show. Par. Cas. 137; 1 Atk. 591; Tr. of Eq. 62. § 6; Butler's Fearn, 373; 1 Leon. 33. In this last case, the time of limitation was till a debt should be paid. As to copyhold, Com. Dig. Copyhold, c. 11; Com. Dig. 4; Roll. 749, 791, l. 40; Watk. Copy, 202, 210.

At the common law, as it has been already observed, there may be *two concurrent fee*, each expectant on the same particular estate; one to take place as a *vested interest*, in case the other should fail to give an interest of that description; but, by the common law, a fee cannot take place in derogation of another estate in fee, after that estate is vested.

In cases like *Luddington* and *Kime*, both fees must give contingent interests. The first fee must necessarily be contingent, because it is limited to an uncertain person, or to a person not born, or be limited to take place on a contingency; and the ulterior fee must be contingent, because it is to give a vested interest only, in the event, that the fee first limited, should not confer an interest of that description. By a deduction from the same principles, it was formerly held, that estates limited to take effect in default of the exercise of a power of appointment, which extended to authorize a disposition of the fee, must be contingent (*d*).

More modern determinations (*e*) have settled the law to be, that the estates limited to take place in default of an exercise of such power of appointment, may be vested, subject to be divested wholly, or defeated partially, by an execution of the power; the law implying the intention, which skilful conveyancers express,

(*d*) *Leonard Lovie's case*, 10 Rep. 78.

(*e*) *Cunningham and Moody*, 1 Ves. 174; *Walpole and Lord Conway*, Barn. Ch. Rep. 153; *Doe v. Martin*, 4 Term Rep. 39.

that, in the mean time, till appointment, and from time to time, subject to such appointment as shall have been made, the land or other subject of property shall be to the particular uses which are specified, and capable of taking effect; and that the appointment, when made, shall exclude the estates arising from these uses, either altogether or in part, according to the extent to which the power shall be exercised.

This doctrine has been questioned (*f*). It is too fully and clearly settled to be shaken. But it is to the doctrine of uses alone, and interests created by will, that cases of this description are referrible.

Under devises in wills too, as already noticed, the ultimate fee will remain in the testator's heir at law, till his will shall give a vested interest in the fee; and under limitations of the use, the fee will result to the former proprietor, till it shall vest in the person to whom it is limited in contingency (*g*).

The cases of *Wellington v. Wellington*, and *Lethulier v. Tracy*, are exceptions to the rule under examination.

These authorities admit, that, under the peculiar circumstances of these cases, there may be one fee after another fee by way of remainder. The cases are anomalies. Though they may be followed in decision, they are not to be supported in principle.

(*f*) *Smith and Lord Camelford*, 2 Ves. jun. 707.

(*g*) *Earl of Bedford's case*, Poph. 3; *Fenwick and Mitford*, 1 Leon. 182.

In *Wellington v. Wellington* (h), the testator devised in these terms: "Item, in default of issue of my own body, I give, devise, and bequeath," &c.; he then gave all his estates in several counties unto *John Arrowsmith* and *James Simmons*, and their heirs, in trust, to pay out of the rents, issues, and profits, unto his sister, *Elizabeth Wellington*, an annuity of 100*l.* per annum, during such time and until his just debts, funeral expenses, and legacies (other than annuities), should be fully paid and satisfied; and also an annuity of 40*l.* per annum to a servant, *Sarah Vollier*: then he gave another annuity and several legacies: then immediately from and after such time as all his just debts, funeral expenses, and the legacies given by his will (other than annuities), should be fully paid and satisfied by the said trustees, from and out of the rents and profits of his said estates, and subject to the two annuities before given to the said *Sarah Vollier* and *Jane Wellington*, he gave and devised all his estates to his sister *Elizabeth Wellington* for life; afterwards to the said trustees, to preserve contingent remainders; and after her decease, to the use of *James Wellington*, the second son of his said sister *Elizabeth*, for life; then to the use of the trustees during his life; and after his death, then to the use of his first and other sons in strict settlement, with remainders over.

The said testator, at the time of making his

(h) 4 Burr. 2165; 1 Sir W. Black. 645.

will, and at the time of his death, was seised in fee of the premises devised by him to the said *John Arrowsmith* and *James Simmons*, in default of issue of his own body, and died a bachelor, leaving the said *Elizabeth Wellington* and *Jane Collins*, wife of *Thomas Collins*, his sisters and co-heirs. The said trustees accepted the trusts.

On a case from the Court of Chancery, for the opinion of the B. R. the question was, whether the said *John Arrowsmith* and *James Simmons*, the trustees in the said will, took any, and what estate, under the said will. And after hearing arguments on both sides, the Court certified, that *John Arrowsmith* and *James Simmons* took a fee, determinable when the purpose of paying the testator's debts, legacies, and funeral expenses, out of the rents, issues, and profits of the devised premises, in aid of the personal estate, should be performed.

Lethulier v. Tracy, will be stated in the next page. In cases of this description, it would have been far more consistent with principle to have decided, that the trustees had the fee-simple at law, subject to trusts in equity, for the persons who were beneficially interested; or (as was done by the Court of King's Bench, in *Goodtitle v. Whitby*) (i), that the trustees had chattel interests till debts paid, with vested remainders after and expectant on these interests.

According to Mr. *Fearne*, "a contingent de-

(i) 1 Burr. 228.

terminable fee, devised in trust for *some special purposes* only, will not prevent a subsequent limitation to one *in esse* from being vested ; as where *A* devised lands to his daughter for life (*j*) ; remainder to trustees [for her life,] to support contingent remainders ; remainder to her first and other sons successively in tail : and if his daughter should depart this life without issue of her body living at her death, then he devised the lands to *trustees and their heirs*, until his cousin *N* should attain his age of twenty-one years, upon certain trusts, &c. Item, he gave and devised the lands to his cousin *N* after he should have attained his age of twenty-one years, for the term of his life ; remainder to trustees [for his life], to support contingent remainders ; remainder to the first and other sons of *N* successively in tail, &c. ; and in default of such issue, or in case *N* should die before twenty-one, and without issue, remainder over. Lord *Hardwicke* held, that the contingency of the daughter's dying without issue living at her death, affected only the estate limited to trustees, until *N* should attain twenty-one ; and this limitation to trustees was not an absolute fee, as was contended, but a determinable fee : that the estate limited to *N* was only contingent until he should attain twenty-one, and this contingency extended to none of the subsequent estates, and therefore the remainders over to persons *in esse*, were vested.

(*j*) *Lethulier v. Tracy*, 3 Atk. 728.

In order to bring a case within the influence of this authority, four circumstances must concur :

The fee must

1st, Be contingent ;

2d, Determinable; and, it is apprehended, determinable in a small compass of time ;

3d, Devised by will ;

4th, The devise must be for some particular purpose, to be answered in a small compass of time ; and the fee which is devised, must be limited to cease, when the purpose for which it is limited, shall be answered.

It is also understood, that in the case of *Tracy v. Lethulier*, (the authority for this point,) the devise to *N* took effect under the learning of executory devises, as a devise to commence at a future period, independent of any estate of freehold previously limited, and not as a remainder, although the estate limited to the trustees was to take effect as a remainder.

Indeed, the judgment in the case of *Lethulier v. Tracy*, is expressed in language which leaves the effect of that judgment in great obscurity.

It is clear, that the daughter took an estate for life, with remainder to her first son in tail, remainder to her second and other sons in tail general, remainder to her daughters as tenants in tail.

The next limitation was in favour of the trustees and their heirs, on the contingency that the daughter should die without issue living at her death ; and the construction of this contingency was, that she should die without *such* issue, and during the minority of Sir *Henry Nelthorpe*, who was to take beneficially under the subsequent limitations.

From the language in which this gift to the trustees was introduced, and from the nature of the limitation to them, their estate was contingent, and was a contingent remainder in fee, because it was limited to them and their heirs. A consequence flowing from the circumstance of their taking a fee, was, that all the limitations over, as far as they were to confer legal estates, were necessarily contingent, till it was ascertained that this remainder in fee could not vest, or till the fee was determined by Sir *Henry Nelthorpe's* attaining his age of twenty-one years.

On the determination of this fee, or after it was ascertained that it could never vest in interest, the limitations over were capable of effect. They were to take place as executory devises, as far as concerned the fee devised to the trustees; and as remainders, as far as related to the previous limitations in favour of the daughter and her children.

These observations must be confined to the legal estate; for though it had happened that the fee of the trustees had become absolute by the death of Sir *Henry Nelthorpe* under twenty-

one; and consequently the limitations over had been rendered incapable of effect, as legal estates by executory devise; yet it seems, that the persons entitled under these limitations over would have been the beneficial owners, under the limitation to the trustees and their heirs.

It is evident, that Lord *Hardwicke* treated the estate of the trustees as a *determinable fee*. It therefore follows, that their estate must have become absolute on the death of Sir *Henry Nelthorpe* under the age of twenty-one years; for, if the true construction of the limitation to the trustees and their heirs had been, that their estate should cease, either when Sir *Henry* should attain twenty-one, or on his death during his minority, the conclusion necessarily arising from this circumstance would have been, that the trustees had a mere estate of freehold for the life of Sir *Henry*, determinable either on his death during his minority, or on his attaining the age of twenty-one years; and then all the limitations over might, with great propriety, have been considered as *vested* remainders, even before the event of the death of the daughter without issue living at that time, was ascertained.

But in *Goodtitle v. Whitby* (k), although the devise was to trustees and their heirs, or rather to them and the survivor and his heirs and assigns, in trust, to educate children during their minorities, and when and as soon as they should respectively attain their respective ages of twenty-one years, then to the use, &c. of

(k) 1 Burr. 428.

the children ; it is reported, that Lord *Mansfield*, applying the observation to the estate of the trustees, said, this is only a chattel interest, which cannot last twenty-one years.

The like view and solution of the case of *Lethulier v. Tracy*, would, except so far as it would have made the heirs, instead of the executors, the trustees, have been more consistent with our system of tenures. It would have avoided the solecism, and apparent inconsistency of a fee with an ulterior vested interest, while that fee was capable of effect.

There is one instance, however, in which, by the acknowledged rules of law, a fee may, by Will, be limited in contingency, and yet the fee may be vested under another gift. The gift of a fee in contingency, with a gift of the fee by a residuary clause (*kk*), is an example of this state of title. The residuary devisee is substituted in the place of the heir, who would take in default of a gift. An express and specific devise would produce the like effect. So would a proper limitation of an use.

In effect and sound construction, the vested fee governs the seisin, and the contingent fee becomes a species of charge, or interest, to arise alternately when it can vest.

The case of *Wealthy v. Bosville* (*l*), affords a principle which must govern cases of this description.

And if the estate of the trustees be, by

(*kk*) *Rogers v. Gibson*, 1 Ves. sen. 485; *Duke of Bridgewater v. Egerton*, 2 Ves. sen. 122. (*l*) Rep. temp. Hard. 258.

construction, determinable at the death of any person, then the estate is merely for life, and the case is free from the difficulties which arise from considering their interest as a determinable fee.

And there may at the same time be in the same lands several estates-tail (*m*), and a remainder or reversion in fee, by the grant of the party. This is a result of the statute *de Donis*, since that statute made the estate-tail a particular estate (*n*).

A fine with proclamations will bar the intail, and take away the privilege of the issue under this statute; and the estate, which originally was an intail, will, unless there be a discontinuance (*o*), become a base or determinable fee; and by these means there may be a base or determinable fee and a fee-simple, in the same land, at the same time (*p*). Also, if a gift in tail had been made to a villein, when villeinage prevailed, and the lord had entered, he would have had a base fee, and the fee-simple would still have remained in the donor, remainder-man, or reversioner (*q*).

Whether the fee may be in abeyance as to all mankind, is a point much agitated, and still remains in doubt (*r*). It is clear, that an

(*m*) 1 Inst. 22 a; 1 Roll. Abr. 609, f. 2.

(*n*) 1 Inst. 18; Lord Raym. 779; Litt. § 19, 22 a.

(*o*) See *infra*, ch. Tail.

(*p*) *Simmonds v. Cudmore*, 4 Mod. 1; *Machel v. Clarke*, 2 Ld. Raym. 778; 3 Abstr. 228; 1 Abstr. 357.

(*q*) 1 Inst. 18 a, 117 a.

(*r*) Butler on 1 Inst. 342 b; 2 Abstr. 101; 3 Abstr. 254.

interest in fee may be contingent, as well as an interest for any given *space of time*. The only question which can be raised is, whether the *fee* must not in all cases be vested in some one, though it may be in contingency as to another person; and therefore the question which suggests the doubt, is stated in those terms which show the point in debate.

It is universally allowed, that in all cases(*rr*) of limitations of use, and devises by will, the fee, though limited in contingency as to the object of the assurance, will, unless otherwise disposed of, be *vested*, in the case of a will, in the testator's heir at law; and in the case of a limitation to uses, in the person out of whose estate the uses are raised. And there may be a gift of this ultimate and reversionary interest.

In wills, this undisposed interest may pass, and frequently does pass, under a residuary clause; and *a fortiori*, it may pass by a specific devise.

It is then to limitations of the fee to take effect merely by the rules of the common law, that the doubt is applicable. The question does not arise from express determinations, but rather from the absence of authorities on the very point. The authorities, as far as they go, seem uniform in establishing the position, that the fee may, as to all mankind, be in abeyance or contingency. The objection adduced is, that this conclusion is founded on wrong notions, and on a mistake of first principles; and that there

(*rr*) *Quære*, as to Copyholds.

are not any determinations conclusive on the point; and to those who maintain this opinion, it seems that the fee must remain a vested interest in the former proprietor, till it shall become a vested interest in the person to whom the limitation of this estate is made (*s*).

It is also decided, that the same person may have in the same lands a fee, and eventually and by descent an interest by executory devise, which may divest the fee, and vest it in the former owner (*t*). But by the rules of the common law, the same person cannot have the fee and a power over the fee (*u*); in short, at the common law, no power could exist in the owner distinct from the seisin; but even at the common law, under the learning of devises, and now under the statute of Wills, one person may have the fee, either by devise or descent (*x*), with an authority to another over the fee, or any part of it; and under that authority he may sell and divest the fee given by the will, or descended to the heir: and in conveyances and wills, to uses, one and the same person may have the fee, and also a power over the fee. This point is fully established (*x*). But the same person cannot have the legal fee as a grantee to uses, and also the fee as *cestui que*

(*s*) See Fearn, 526.

(*t*) *Goodtitle ex dem. Vincent v. White*, 15 East 174.

(*u*) *Goodill v. Brigham*, 1 Bos. & Pull. 192; 3 Conv. 265. 494.

(*x*) 1 Inst. 113.

(*y*) *Sir Edw. Clere's case*, 6 Rep. 18; *Maundrell v. Maundrell* 7 Ves. jun. 567; 10 Ves. jun. 246.

use, and a power over the fee; unless some other person be concerned in interest, so that the uses may arise and be executed into estate under the statute of Uses. This point is examined in *Watkins's Principles*, p. 124, and in *Conveyancing*, vol. 2. p. 481.

And although the power does, in the order of the deed, precede the limitation of the fee, and the fee is limited *only* in default of appointment, without the usual provision for the intermediate period till appointment, the fee will be vested, subject to be divested or postponed by the exercise of the power, in like manner as if the fee had been limited in the first instance, and the power had been introduced by way of proviso, giving a right to postpone or defeat that estate (2).

A fee may be had in all lands, and all subjects existing in the land, as buildings; in all things issuing out of or chargeable on the land; as rents, commons, estovers, tithes; and in all things which may continue for ever, as a personal annuity, duties, or an annuity payable out of those duties. In short, there may be an estate in fee in every subject, except personal chattels; and even some personal chattels may be heir-looms, and as such, of the nature of an inheritable subject.

And in the contemplation of courts of equity, there may be money land, or rather

(2) *Lovie's case*, 10 Rep. 78; *Walpole v. Conway*, 3 Barnardiston's Rep. 153; *Cunningham v. Moody*, 1 Ves. 174; *Doe v. Martin*, 4 Term Rep. 39.

money convertible, by its application in purchases, into land; and in the mean time, the right of succession to the money will in equity be in the same manner as if the money had been invested in the purchase of land; *viz.* the heir will exclude the executor, &c.

This division and general view of the subject was introduced principally for the purpose of correcting an inaccuracy, that immobility is requisite to the existence of a fee. Mr. *Cruise* has observed (*a*), that there are two qualities essentially requisite to the existence of a freehold estate; 1st, immobility; *i. e.* the subject matter must be either land, or some interest issuing out of land; 2dly, a sufficient legal indeterminate duration; for if the utmost period to which an estate can last, is fixed and determined, it is not an estate of freehold.

The accuracy of the first branch of the proposition is disproved, by showing, that a man may have a fee in an annuity, and yet an annuity is a personal grant by a man, for himself and his heirs, to another and his heirs. This annuity is neither land, nor issuing out of land. The like observation may be applied to a corrody, or to a grant to a man and his heirs, of the four per cent. duties leviable in the island of *Barbadoes*. In these instances the *permanency* of the interest, and not the immobility of the subject, is the reason that a fee may be had therein.

(a) 1 Dig. 7.

The second branch of the proposition is rendered more obvious, by the illustration with which it is accompanied. The allusion is to a *term* of years as a time finite, contrasted with a time which, in the case of a fee-simple, will be, and in the instance of a determinable fee may be, *infinite*.

By the utmost period to which an estate can last, we must understand that period which cannot be defined by any other means than a term of years, or a limitation from one day till another day, and which is in effect a limitation of a *term* of years.

The like limitation may, in some instances, give a chattel, and in other instances, a freehold, interest.

Thus, a gift by deed or will to a man and his heirs till debts shall be paid, is clearly a fee; while a devise to a man and his *executors* till debts shall be paid, is a chattel interest.

So a grant to a man and his heirs till his marriage, is a fee determinable on his marriage; while a grant to a man till his marriage, is in the absence of a limitation to his heirs, a grant of an estate for his life, determinable on his marriage. So a gift to a man and his heirs till the marriage of *A*, is a determinable fee; while, on the other hand, a gift to a man and his heirs, while *A* shall remain unmarried, passes only an estate for the life of *A*, determinable on his marriage.

In short, an estate in fee answering to either

of the denominations already noticed (*b*), may be had in any hereditament, corporeal or incorporeal; and an estate of this quantity may exist in the right of taking a thing merely personal; and this personal thing, from the nature of the estate for which it is granted, is termed an hereditament; because this subject of personal property may be taken in continual succession and inherited. But in some personal things, as an annuity, an estate in fee cannot be created, unless the *heirs* of the grantor be bound expressly, and in that character, to the payment or render of the annuity. For this reason, the grant must be by one party *for himself* and his *heirs*, to the other party and *his heirs*.

In general, the owner of a fee, though determinable, base, or qualified, is dispunishable for waste, and has the power of opening mines, cutting timber, &c.

Yet when he has an estate which will either determine by his death, or become absolute on that event, he will be treated by a court of equity as a tenant for life, and be restrained from cutting timber, &c. while his estate is determinable.

The like rule extends to an heir who takes the fee by descent, subject to be defeated by executory or contingent devises, &c. which may vest (*c*).

(*b*) 2 Ves. jun. 660.

(*c*) *Stansfield v. Habbergham*, 10 Ves. 273; *Robinson v. Litton*, 3 Atk. 209; *Gore v. Gore*, 2 P. W. 27.

Also in *Wright v. Atkins*, *M. Atkins* was devisee in fee, subject to this provision; "in the fullest confidence, that after her decease she will devise the property to my family." And it having been decided (*d*), that her beneficial ownership was for life only, and that she was a trustee of the inheritance, she was, at the suit of the testator's heir, restrained by injunction from cutting timber.

The modes of assurance by which this estate may be conveyed, are,

1. Matter of record; as,

1. Fine,
2. Recovery.

2. Acts in Pais, and

1. By acts executed; as deeds, &c.
2. By acts executory; as by devise.

And as to acts executed, lands in possession pass, 1. By feoffment; 2. By bargain and sale: 3. By covenant to stand seised to uses; and lands in reversion, and things lying in grant, pass either by conveyances of the second or third sort; or 3dly, by grant; 4thly, release or confirmation operating in enlargement of a prior particular estate for years, or for life, or in tail; and the *right* to an estate of this extent, or any interest of the quality of this estate, and issuing out of lands, may be determined by release in extinguishment of the right or interest. On partitions between coparceners, the estate passes by mere agreement; or more accurately

(*d*) 17 Ves. 255; 1 Ves. & Bea. 313.

speaking, the unity of title and of possession is severed, and the partition adjusts the distinct rights of the parties to the possession, &c. Hence follows a very important consequence. There is not any change of seisin. For that reason, the mode of descent will not be altered (*e*).

Even a rent granted for owelty of partition, will be descendible, in like manner as the seisin was descendible to the grantee (*f*). *Ipse etenim leges cupiunt, ut jure regantur.*

(*e*) 2 Abstr. 71, 72.

(*b*) 1 Inst. 169 b, 177 b.

END OF VOL. I.

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